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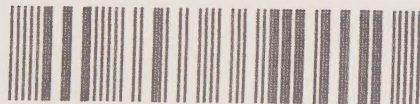


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# THE LAW REPORTS

9, 10 Exchequer

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THE  
LAW REPORTS.

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Court of Exchequer.

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REPORTED BY  
JAMES ANSTIE AND ARTHUR CHARLES,  
BARRISTERS-AT-LAW.

---

EDITED BY  
JAMES REDFOORD BULWER, Q.C.

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VOL. IX.  
FROM MICHAELMAS TERM, 1873, TO TRINITY TERM, 1874,  
BOTH INCLUSIVE.  
XXXVII VICTORIA.

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JUDGES  
OF  
THE COURT OF EXCHEQUER,  
XXXVII VICTORIA.

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The Right Hon. Sir FITZROY KELLY, Knt., C.B.  
Sir SAMUEL MARTIN, Knt.  
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.  
Sir GILLERY PIGOTT, Knt.  
Sir ANTHONY CLEASBY, Knt.  
Sir CHARLES EDWARD POLLOCK, Knt.  
Sir RICHARD PAUL AMPHLETT, Knt.

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SOLICITORS GENERAL:

Sir W. V. HARCOURT, Knt.  
SIR RICHARD BAGGALLAY, Knt.  
JOHN HOLKER, Esq.



# ERRATUM.

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ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,  
IN AND AFTER  
MICHAELMAS TERM, XXXVII VICTORIA.

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KNOWLMAN *v.* BLUETT.

1873

Nov. 10.

*Statute of Frauds, s. 4—Agreement not to be performed within a Year—Contract for the Support of Illegitimate Children—Annuity—Amendment of Claim.*

The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her 300*l.* per annum by equal quarterly instalments for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old:—

*Held*, that this agreement was not one “not to be performed within a year from the making thereof,” within the meaning of the Statute of Frauds, s. 4, and was therefore binding, though made by parol only.

Per Bramwell and Pigott, BB.:—the agreement was one which might at any time have been terminated by either party giving notice to the other.

The claim in a declaration may be amended, under the Common Law Procedure Act, 1852, s. 222, by the judge at the trial.

DECLARATION that the plaintiff, being sole and unmarried, was seduced by the defendant, by means whereof she became the mother of an illegitimate child; that she afterwards became the mother of six other illegitimate children by the defendant, and thereupon “in consideration of the premises and that the plaintiff would, at the request of the defendant, take, and continue to take the sole charge

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of the said children, and supply them with such things as should be necessary for their care and nurture, and for their use and benefit, and educate, and find and provide for the education of the said children, the defendant promised the plaintiff that he would pay the plaintiff an annuity or sum of 300*l.* per annum for and during a term which has not yet expired," the said annuity to be paid in four equal quarterly payments on the usual quarter days "in each and every year during the term aforesaid;" that all conditions, &c. were fulfilled, yet the defendant discontinued the payment of the said sum, and two years arrears were due and unpaid. The claim was for 600*l.*

Plea (among others), denying the promise. Issue.

At the trial before Kelly, C.B., at the Devon Summer Assizes, 1873, it appeared that the defendant was the father of seven illegitimate children of the plaintiff born between the years 1851 and 1865, and, according to the plaintiff's evidence, at a conversation which took place at some period before the year 1866, when the plaintiff and defendant finally separated, the defendant said, "I shall merely give you sufficient to bring up the children properly. I will give you 300*l.* a year to keep the children." The plaintiff's brother stated that when the separation took place the defendant told him he would allow the plaintiff 300*l.* a year for the education and support of the children until he could afford to put down a sum of money; and in an unsigned letter written by the defendant to the plaintiff on the 18th of February, 1866, he wrote, "I have always told you I would give you 300*l.* per annum whilst I have it in my power, until I can give you a fixed sum which I am working hard to get matters settled so as to put it in my power to accomplish." The defendant paid several instalments of the annuity, but having become dissatisfied with the mode in which his children were being brought up, had, since Michaelmas, 1870, discontinued his payments, and the plaintiff now sought to recover two years and a half arrears. It was objected on behalf of the defendant that the promise established by this evidence should have been in writing, signed by the defendant, to satisfy the 4th section of the Statute of Frauds (29 Car. 2, c. 3), which enacts (among other things) that no action shall be brought to charge any person "upon any agreement, that is not to be performed within the space of

one year from the making thereof, unless the agreement or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The learned judge overruled the objection, and upon its appearing that at the time of action brought two and a half years of the annuity were in arrear, and not two years, for which alone the claim in the declaration was originally made, amended the claim from 600*l.* to 750*l.*, and directed a verdict for the plaintiff for the latter sum. Leave was reserved to move to enter a nonsuit, if the Court should be of opinion that there was no evidence to go to the jury in support of the promise, or to reduce the damages to 600*l.*, the amount originally claimed, if the Court should be of opinion that the claim could not be amended.

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*Cole, Q.C. (Arthur Charles, with him)*, moved accordingly. First, the contract proved was not in the contemplation of either party to be performed within the year; and that it was to extend beyond that period appears from its whole tenor. It must therefore be in writing.

[BRAMWELL, B. In *Souch v. Strawbridge* (1), it was held that a contract to maintain a child at the defendant's request for so long as the defendant should think proper, need not be in writing.]

That was an undertaking revocable at the defendant's pleasure. Here, having regard to the ages of the children, both parties must have contemplated a period beyond a year. The children were all young and for years would be unable to maintain themselves. In *Farrington v. Donohoe* (2), it was held that a parol promise to maintain a child, known to be about five years old, until able "to do for herself," was within the statute, although the child might die within the year. A contract for the payment of an annuity for life must be in writing, though it may determine within the year by the death of the annuitant: *Sweet v. Lee*. (3) In *Dobson v. Collis* (4), a verbal contract of service for more than one year, though determinable by either party within the year by a three months' notice, was held to be invalid, and

(1) 2 C. B. 808; 15 L. J. (C. P.) 170.

(3) 3 M. &amp; G. 452.

(2) Ir. Rep. 1 C. L. 675.

(4) 1 H. &amp; N. 81; 25 L. J. (Ex.) 267.

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Pollock, C.B., says in his judgment (1), "In my opinion this contract is not the less within the statute, because it is liable to be defeated within the year." There is no distinction between the case of a contract defeasible by the act of the parties and by death. Secondly, as to the reduction of damages, the judge had no power to amend the claim. Sect. 222 of the Common Law Procedure Act, 1852, does not apply. An amendment of the claim is not a "defect or error" within the meaning of that section.

BRAMWELL, B. I am of opinion that this rule should be refused. A promise of some sort, it is admitted, was made by the defendant, and the first question is what that promise was. It appears to me that it was a promise to pay the plaintiff at the rate of 300*l.* per annum, payable quarterly, so long as she should maintain the defendant's children. The sum may be called an "annuity," but really the engagement was one not binding on either party for any definite space of time. The defendant might, in my opinion, have said to the plaintiff at the end of any particular quarter—I will not say without, perhaps, giving a reasonable notice—"I shall no longer contribute to or provide for the maintenance of the children. I shall maintain them no longer." It seems to me impossible to hold that the defendant was bound for an indefinite time, and that so long as the children remained with the plaintiff, no matter what their ages or position might be, he was to be liable to pay this sum of 300*l.* every year. I cannot think that if, for example, he had become a poor man, or if the children had become able to maintain and were maintaining themselves, he would not have been at liberty to withdraw from his engagement. Again, the contract, if binding upon him for all time, would also be binding upon the plaintiff. But I cannot conceive for a moment, upon the case before us, that the plaintiff was bound to continue to maintain and educate the children for any definite period. At any time she might have declined to continue to do so; and on the other hand the defendant at any time would have been at liberty to terminate his liability.

If, then, this be the correct view of the promise proved at the trial, it is manifest that it is not within the Statute of Frauds, s. 4. It might have been performed within the year, although, no doubt,

(1) 25 L. J. (Ex.) at p. 268.



both parties expected it would last longer than the year, and upon this ground alone I think the rule should be refused.

But, further, I think that the plaintiff could have recovered if the declaration had contained a count alleging that at the defendant's request she had maintained these children upon the terms that he should pay her at the rate of 300*l.* a year. In *Souch v. Strawbridge* (1), Tindal, C.J., expressed an opinion that the Statute of Frauds did not apply to an executed consideration. The other judges in that case neither assented to nor dissented from that proposition, and I do not desire to raise a discussion upon it now. I think that, whether it be law or not, the plaintiff here might have succeeded, in the view which I take of the evidence, upon such a count as I have suggested. This reduces the question before us to one of pleading. Upon the general question of the defendant's liability I have intimated my opinion that he is at liberty to withdraw from his obligation if he think fit, either at the end of any quarter or upon a reasonable notice ; but as far as this action is concerned he is, in my judgment, liable to the plaintiff.

As to the amendment, I think my Lord was right in making it. The 222nd section of the Common Law Procedure Act does not deal with questions of variance only, but enables a judge to make any amendment necessary for determining the real controversy between the parties. I am of opinion that a claim may be amended under the terms of this section, which was purposely framed by the late Mr. Justice Willes and myself in the most comprehensive words which could be used.

PIGOTT, B. I am of the same opinion. The effect of the contract has been, I think, rightly stated by my Brother Bramwell. No time is fixed during which the defendant's undertaking is to continue, and, that being so, the language used by Best, C.J., in *Wells v. Horton* (2) is applicable. "The plain meaning of the words (of the statute)," he says, "is confined to contracts which are not to be carried into execution within the year, and does not extend to such as may by circumstances be postponed beyond that period ; otherwise there is no contract which might not fall within the statute." And it seems to me the necessary consequence of

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(1) 2 C. B. 808; 15 L. J. (C. P.) 170.

(2) 4 Bing. 40, at p. 43.



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this interpretation of the contract is that it is competent to either party to put an end to it at any time. For instance, if the defendant had become straitened in circumstances, or desirous of maintaining his children in some other manner than by paying the plaintiff for their maintenance, he might have said, "I will no longer go on on the old footing; I will pay the annuity no longer;" and on the other hand the plaintiff might at any moment have declined to continue to keep the children.

There remains the question of the amendment, as to which I agree with what has been said. I think it clear that under the 222nd section of the Common Law Procedure Act, 1852, my Lord had power to amend the claim.

KELLY, C.B. I retain the opinion upon this case which I entertained at the trial, and think there should be no rule. I forbear to pronounce any opinion as to whether it was competent to either party to determine this contract at his or her pleasure. The contract proved was a contract to pay the plaintiff 75*l.* a quarter so long as she should maintain the children, of which the defendant was the father. The declaration speaks of the sum to be paid as an "annuity," and in one sense it may be called an annuity. But it is not necessarily to be paid annually, nor is it necessarily to continue for an entire year, still less for a number of years. The engagement is to pay the plaintiff at the rate of 300*l.* a year so long as the plaintiff should perform the condition upon which the payment was to be made. Under these circumstances the language of Best, C.J., in *Wells v. Horton* (1), and the decision of the Court of Common Pleas, in *Souch v. Strawbridge* (2), seem to me to be in point and to govern this case.

With regard to the amendment, I am clearly of opinion that I had power to make it. It was necessary for the determination of the real question in controversy, and strictly within the words of the 222nd section of the Common Law Procedure Act, 1852, to which my Brother Bramwell has referred.

*Rule refused.*

Attorneys for defendant: *Wedlake & Letts, for R. G. Edmonds, Plymouth.*

(1) 4 Bing. 40, at p. 43.

(2) 2 C. B. 808; 15 L. J. (C. P.) 170.

## DAWSON AND OTHERS v. LORD OTHO FITZGERALD.

1873

Nov. 22.

*Landlord and Tenant—Agreement to pay Compensation for Damage from Ground Game — “Fair and Reasonable Compensation” — Arbitration Clause.*

The defendant agreed with the plaintiffs, his landlords, that he would keep upon the premises demised such a number only of hares and rabbits as would do no injury to the trees or plantations of the plaintiffs, or their growing crops, or the growing crops of their tenants, and in case he should keep such a number as should do injury, would pay the plaintiffs a fair and reasonable compensation. In an action brought for breach of this agreement, the defendant pleaded that “one of the terms of the tenancy was that, in case of any such injury, the defendant would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators or an umpire; that a difference arose, and that no arbitrators or umpire were appointed, and no award made.” On demurrer:—

*Held*, a good plea.

DECLARATION, that the plaintiffs demised to the defendant a messuage and lands called West Park, with liberty of shooting, hunting, &c., over certain manors upon the terms, amongst others, that the defendant would during his tenancy keep, or cause to be kept and encouraged, such a number only of hares and rabbits upon the said manors as would do no injury to the trees, woods, underwoods, and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers; and that in case the defendant should keep, or cause to be kept or encouraged, such a number of hares and rabbits upon the said manors as should injure the trees, &c., belonging to the plaintiffs, or their growing crops, or the growing crops of any of their tenants or farmers, the defendant should and would pay the plaintiffs, or their tenants or farmers, a fair and reasonable compensation for such injury; that all conditions, &c., were fulfilled, yet the defendant did not during his tenancy keep, or cause to be kept or encouraged, such a number only of hares and rabbits upon the said manors as would do no injury to the trees, &c., belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers, but kept such a number as did great injury to such trees, &c., and although frequently requested so to do, would not pay to the plaintiffs, or to their tenants or farmers, or

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any of them, a fair and reasonable, or any, compensation for such injury.

Plea: That one of the terms of the said tenancy was, that in case any such injury should be done by the defendant, he would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the said arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and the defendant; that a difference arose as to the amount of compensation, and that no arbitrators have been appointed, nor any award made.

Demurrer and joinder.

Nov. 19. *Kingdon, Q.C.* (*Arthur Charles* with him), in support of the demurrer. The arbitration clause is collateral, and is not pleadable in bar to an action on the agreement to encourage only such a number of hares and rabbits as would do no injury, or else to pay a "fair and reasonable" compensation. If an arbitration be a condition precedent to bringing the action, no effect is given to the word "reasonable," and the defendant would be bound to pay whatever was awarded, reasonable or not. A cause of action accrued upon the occurrence of the injury. The defendant agreed, without qualification, only to encourage so many hares and rabbits as would do no injury. Suppose the arbitration clause had been in a different instrument, or in a different part of the same instrument, it could not have been contended that it was pleadable in bar, and it can make no difference that it follows immediately after the words binding the defendant either to do no injury or to pay compensation. The case falls within the principle recognised by all the judges in *Elliott v. Royal Exchange Assurance Company* (1), and expressed by Bramwell, B., in *Tredwen v. Holman* (2), in these words:—"If a tenant covenants that he will cultivate the demised premises in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitra-

(1) Law Rep. 2 Ex. 237.

(2) 1 H. & C. 72, at p. 79; 31 L. J. (Ex.) 398.

tion, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will arise until he has ascertained them." In this case there is an absolute covenant.

It may be said that both parties intended arbitration in case of dispute. If that be so, and a judge at chambers deems it a proper case for a stay of proceedings under the Common Law Procedure Act, 1854, s. 11, the defendant can compel a reference, but an arbitration clause cannot oust the jurisdiction of the courts (see Co. Litt. 536); and in considering whether it is pleadable the intention of the parties is not to be considered unless it is clearly expressed, as in *Scott v. Avery* (1), that the reference is to be a condition precedent to the liability to pay. In *Roper v. Lendon* (2) a similar stipulation to the present was held no bar.

*R. E. Turner* (*Sir J. B. Karslake, Q.C.*, with him), contra. The question is one of construction. It may be conceded that whatever the parties intend they cannot oust the jurisdiction of the courts by an arbitration clause; but they can enter into an agreement under which no liability arises until an arbitration takes place. In *Scott v. Avery* (1) the parties expressly stipulated to this effect, and in this case the agreement, properly construed, is that the defendant will only pay whatever upon an arbitration is certified to be a fair and reasonable compensation. The arbitrators are made the judges of what is reasonable, and no liability to pay arises until they have assessed the amount. *Elliott v. Royal Exchange Assurance Company* (3) is an authority for the defendant, the majority of the Court holding that the arbitration clause there was a bar. Again, the plea is good as an argumentative traverse of the agreement alleged in the declaration.

*Kingdon, Q.C.*, in reply.

*Cur. adv. vult.*

Nov. 22. KELLY, C.B. I think the defendant is entitled to the judgment of the Court; and except for certain expressions of judicial opinion, founded upon the dictum of Lord Coke, which has been referred to, I should have deemed the point a clear one. The covenant, or rather agreement, declared upon is contained in a

(1) 5 H. L. C. 811.

(2) 1 E. & E. 825; 28 L. J. (Q. B.) 260.

(3) Law Rep. 2 Ex. 237.



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single sentence, and by it the parties have, in my opinion, bound themselves to put arbitrators in the place of a jury in case of a dispute, and to leave it to them to say what is a "fair and reasonable" compensation.

The ground of the argument for the plaintiff is, that the effect of holding this clause a bar will be to oust the jurisdiction of the courts of law, and the high authority of Lord Coke is relied on as shewing that the courts cannot by agreement be deprived of their jurisdiction. Now unquestionably that was the law at one time, and I lament that it should have been so, for it certainly seems to me highly inconvenient that an agreement to pay damages, and at the same time an agreement to refer to arbitration what those damages should be, should be held to be collateral agreements, so that at one and the same moment two actions might be proceeding, the one for breach of the agreement to pay, and the other for breach of the agreement to refer, in each of which the damages recovered might be different. However, where the two agreements were contained in different instruments, or in different parts of the same instrument, that inconvenience did arise. But here I do not think it does; for the agreement alleged on this record is one and indivisible to pay what may be awarded, and until an award has been made, I do not think there is any liability. It is suggested that there are no negative words in this case, as in *Scott v. Avery* (1); but I do not think it necessary that there should be any where by clear implication the arbitration and award are a condition precedent to liability.

BRAMWELL, B. There is, or ought to be, no doubt as to the principle upon which we ought to decide this case; and, if I may say so, I cannot state it more concisely than in the words which I used in *Tredwen v. Holman* (2), and to which Mr. Kingdon has referred. If there be a covenant to pay in a certain event, and a separate and collateral covenant that in case of difference that difference shall be referred to arbitration, the two are distinct from each other, and one may be broken whether the other be broken or not; and it is no matter whether the two covenants are in different deeds, or in the same deed at different parts of it,

(1) 5 H. L. C. 811.

(2) 1 H. & C. 72, at p. 79; 31 L. J. (Ex.) 398.



or following each other consecutively. If, on the other hand, there is only a covenant to pay whatever upon arbitration shall be found to be due, then no action can be maintained until the arbitration has taken place. Now for a long series of years it has been held, and, as I venture to think, properly and reasonably, that a collateral agreement to refer shall be no answer to an action upon an independent covenant to pay money; nor did the decision in *Scott v. Avery* (1) at all interfere with the law as it then stood. I can conceive many cases where it would be very unjust to allow a defendant to defeat an action for breach of covenant by setting up an arbitration clause in bar. He might thus be enabled, when perhaps the matter really in dispute was a small one, to delay its settlement for a long time, and succeed in entangling a plaintiff in a long and expensive arbitration. There was, in my opinion, nothing unreasonable in a law which said, and says, that this should not be done, but that the defendant should be left to get what damages he could—they might be nominal—for the breach of the agreement to refer. And now, at any rate, the defendant does not suffer any hardship, nor is the intention of the parties defeated; for if he chooses to apply to a judge, and if the judge thinks the case a proper one for arbitration, an order to stay proceedings would be made under the Common Law Procedure Act, 1854, s. 11. But it is by no means a matter of course to stay proceedings under that section, and I have myself sometimes refused to do so where it has seemed to me that the arbitration is only being sought for to cause the plaintiff needless expense and trouble.

With regard to this particular plea, I think it bad, for two reasons. First, I think there is a separate covenant or agreement by the defendant to encourage only so many hares and rabbits as would do no injury, and that he has committed a breach by keeping more. That is a separate cause of action in my opinion, and one in respect of which, supposing the act were done wilfully, vindictive damages might very possibly be given. Then the agreement goes on to provide, that in case the defendant should keep such a number as should injure the trees, &c., of the plaintiffs, or their growing crops, or the growing crops of their tenants or farmers, he should pay a “fair and reasonable” compensation. It

(1) 5 H. L. C. 811.

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may be said, therefore, that the defendant's agreement is not that he will not keep an excessive number of hares and rabbits, but that if he does he will pay compensation ; but even assuming this to be the true construction of it, how is the plea an answer to the breach ? Mr. Turner, who argued the case with his usual clearness, says that the plea is really good as a traverse of the agreement ; in other words, that the promise in the declaration is not properly stated, and if his view of the agreement is correct, he is right. But what does the agreement mean ? If it were simply that the defendant was to pay such damages as might be fixed by arbitration, then the plea is good. But it is not so. The agreement is, that in case of injury a "fair and reasonable" compensation is to be paid ; yet, if the defendant is right, the payment of a reasonable sum would be no answer to the action, because the plaintiffs might say, "We never promised to take a reasonable sum, but only whatever the arbitrators, in case of difference, might find to be a proper compensation."

My own opinion, therefore, is that the plaintiffs are entitled to judgment, first, because I think there is an absolute agreement not to encourage hares and rabbits in such numbers as to cause injury ; and, secondly, because I think there is an absolute agreement to pay what is fair and reasonable, with a collateral agreement that if the parties differ there shall be a reference. The only effect of this collateral agreement is to give the defendant a right to apply for a stay of proceedings under the Common Law Procedure Act, 1854, s. 11. But although this is my opinion, as my Lord and my Brother Pigott take a different view of the agreement, I do not desire formally to dissent from their judgments.

PIGOTT, B. I agree with my Lord that the defendant is entitled to judgment. The doctrine that parties cannot agree to oust the jurisdiction of the courts must be taken with the modifications created by recent decisions, of which *Scott v. Avery* (1) is the principal. In each case I think we ought to consider what is the real intention of the parties as disclosed upon the face of the agreement ; and reading this record I come to the conclusion that the real agreement was, that in case of injury occurring from over-encouragement of ground game, the defendant should pay what-

(1) 5 H. L. C. 811.

ever the arbitrators should fix, and that that sum should be regarded between the parties as a fair and reasonable compensation. In other words, he promised to pay what they, and not what a jury, should think fair and reasonable.

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*Judgment for the defendant.*

Attorney for plaintiffs: *P. A. Hanrott.*

Attorneys for defendant: *Markby, White, & Burra.*

THE MAYOR, ALDERMEN, AND BURGESSES OF KIDDERMINSTER v. *HARDWICK.*

*Nov. 14.*

*Corporation—Common Seal—Mutuality—Executory Contract—Part Performance—Ratification.*

The plaintiffs, a municipal corporation and local board, on the 17th of July, caused certain tolls to be put up for letting by auction, under conditions by which the purchaser was immediately on the fall of the hammer to pay a month's rent in advance, and to produce two sureties, who were forthwith to sign the conditions and a draft lease.

The defendant was the highest bidder at the auction, and was declared the purchaser, and he paid a month's rent in advance, and signed an agreement to become lessee indorsed on the conditions; but he did not then, nor at any subsequent time, produce two sureties; and the plaintiffs ultimately, in pursuance of the conditions, determined the contract and sold the tolls at a loss.

The contract was not executed by the plaintiffs under their common seal, nor signed on their behalf by any person authorized under seal to do so. After the sale, the plaintiffs, on the 7th of August, by resolution, which was entered on the minutes under seal, adopted the report of a committee, to the effect that the tolls had been put up to auction, and that the defendant had become the purchaser at a rent of 350*l.* and had paid a deposit of 29*l.* 3*s.* 4*d.* Before this, however, the defendant had, on the 4th of August, written to the plaintiffs saying that he could not carry out his contract, and asking for a return of the sum paid.

In an action brought against the defendant to recover damages for the breach of his agreement to take the tolls:—

*Held*, that the contract was one that required to be made under the plaintiffs' common seal; that not having been sealed by the plaintiffs, nor signed by any person authorized under seal by them to do so, the defendant was not bound by it; that the payment of a month's rent in advance was not such a part performance as would have bound the plaintiffs in equity specifically to perform their agreement; and that the resolution of the 7th of August (even assuming it to be a ratification under seal of the contract) came too late.

ACTION against the defendant for refusing to take a lease of certain tolls according to his agreement with the plaintiffs.

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Plea, amongst others, denying the agreement.

At the trial of the cause before Honyman, J., at the Worcester Spring Assizes, 1873, the following facts were proved:—

The plaintiffs had adopted the Public Health Act, 1849 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), the corporation being (under s. 12 of the former, and ss. 12, 24 of the latter Act) the local board. Acting under the powers contained in s. 50 of the Local Government Act, 1858, and the sections of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), thereby incorporated, the plaintiffs had erected a market, and duly published a list of tolls. The market was opened early in the year 1872, and the plaintiffs had hitherto taken the tolls themselves by a collector.

On the 17th of July, 1872, the markets committee (see 5 & 6 Wm. 4, c. 76, s. 70) made a report to the town council, recommending that Messrs. Downton & Son should be directed to offer for sale by auction “the tolls of the cattle and vegetable markets and weighing machine,” and this report was adopted by the town council by resolution, which was entered on the minutes and sealed with the common seal. (1)

On the 18th of July, premises described in the particulars of sale as “the cattle and wholesale vegetable markets and weighing machine, situate at Caldwell, in the borough of Kidderminster aforesaid, the property of the corporation, and the tolls arising from the same,” were accordingly put up to auction by Messrs. Downton & Sons, under conditions which were (so far as is material) to the following effect: 1. The highest bidder was to be the purchaser or renter of the tolls for one year from the 18th of July, with the option of extending the time for two years by giving the lessors three months’ notice previous to the 18th of July, 1873; 2. A lease was to be granted by the lessors on or before the 17th of August, at the expense of the lessee, who was thereupon to be let into possession and receipt of the rents, dues, and profits from that time; 3. The rent was to be payable monthly, in advance, the first payment to be made to the clerk of the lessors, or the auctioneer, immediately on the fall of the hammer, and on the lessee failing to make any such monthly payment, or to perform

(1) It did not appear when this entry was made and the seal affixed.



the conditions, the rent already paid was to be absolutely forfeited to the lessors, and the lease so to be granted, or the present letting, was to be void at their option, and they were to be at liberty to enter into immediate receipt of the rents then due or to become due, or relet the same premises, or any part thereof, to any other tenant, and all losses, costs, damages, and expenses attending the non-performance of the conditions, or otherwise in relation thereto, or to any such second letting, were to be made good by the defaulter; 10. The lessee was on the fall of the hammer to produce two sureties (to be approved of by the lessors or their clerk) for the due payment of the rent and performance of the covenants to be reserved and contained in the lease, who should forthwith sign the conditions and the lease, a draft of which had been prepared by the town clerk and approved by the lessors.

The defendant was the highest bidder, and the tolls were knocked down to him at the rent of 350*l.*, and he thereupon paid a month's rent and signed the following memorandum at the foot of the conditions:—

“I, the undersigned James Morton, do hereby, as agent for and on behalf of the Local Board of the Borough of Kidderminster, acknowledge that Thomas Hardwick has this day been declared the highest bidder for, and accordingly the farmer or renter of, the premises mentioned in the particulars hereunto annexed, and the tolls arising therefrom, at the yearly rent of 350*l.*, and that he has paid into my hands 29*l.* 3*s.* 4*d.*, as and for one month's rent in advance; and I hereby undertake that the said local board shall, on their part, fulfil the above-written conditions; and I, the said Thomas Hardwick, do hereby acknowledge that I am the farmer or renter of the same at the said yearly rent of 350*l.*, and I hereby agree to execute a lease containing the above and all other usual stipulations, and in all other respects on my part to fulfil the above-written contract; and we — and — hereby agree to become securities for the said Thomas Hardwick for the due performance by him of the foregoing conditions and stipulations to be contained in the said lease, which we also agree to execute when prepared. As witness our hands this 18th day of July, 1872.” (1)

(1) It did not clearly appear whether this memorandum was signed by the town clerk.

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No memorandum of the sale or letting was signed by the auctioneer.

The defendant did not produce his sureties according to the conditions; some time was given him by the town clerk for the purpose of doing so, but he failed to obtain any sureties; and on the 4th of August he wrote to the town clerk, saying that he was unable to do so, and withdrawing from the contract, and asking for a return of the rent already paid.

Previously to this the keys of the market had been handed to the defendant by the person in charge of the market; but this had been done in error, and contrary to the directions of the town clerk; and it did not appear that actual possession of the premises had been taken, or any tolls received, by the defendant, who afterwards returned the keys.

On the 7th of August the markets' committee reported to the town council that "they had caused the tolls to be offered by public auction on the 18th July, when Mr. Thomas Hardwick became the purchaser for one year, with liberty to extend the time to three years upon notice, at the annual rent of 350*l.*, and paid a deposit of 29*l.* 3*s.* 4*d.*, which amount had been paid to the treasurer;" and this report was "adopted" by the council, and was entered on the minutes under seal.

Afterwards, the defendant having failed to produce his sureties, the plaintiffs determined the letting, and relet the tolls by auction to another person at a rent of 250*l.*; and they now sought to recover from the defendant the difference and the costs of the resale.

At the trial it was objected for the defendant that the contract was one which required the seal of the plaintiffs; that it was not so sealed, and that the defendant was therefore not bound. The learned judge left the question of damages to the jury (who found a verdict for the plaintiffs for 45*l.*), and reserved leave to the defendant to move to enter a nonsuit or a verdict for him.

A rule having been obtained accordingly,

*R. V. Williams (J. O. Griffiths, with him)*, shewed cause. Although the auctioneer was authorized by the resolution of the 17th of July, which was under seal, to sell the tolls, it must be admitted that the

only contract signed was that signed by the town clerk, and not by the auctioneer. But immediately after the auction a month's rent was paid by the defendant to the town clerk, and that sum was afterwards paid over to the treasurer of the plaintiffs, and accepted and retained by them. This, coupled with the delivery of the keys, or even alone, constituted a part performance, which would have entitled the defendant to maintain a suit for specific performance against the plaintiffs: *Nunn v. Fabian* (1): and that being so, the objection of the want of mutuality is removed, and the defendant, who had signed an agreement to take the tolls, is bound: *Ecclesiastical Commissioners v. Merral* (2): *Wood v. Tate* (3); *Doe d. Pennington v. Tanriere*. (4)

[POLLOCK, B. In all these cases there was an executed consideration, of which the party contracting with the corporation had taken the benefit. Here the defendant has never had possession.]

It is laid down in *Ecclesiastical Commissioners v. Merral* (2) that it is enough if the corporation are equitably bound; and here the plaintiffs were bound by accepting the month's rent in advance.

[POLLOCK, B. How could the defendant have claimed specific performance, when he was never ready to produce his sureties? He might perhaps have had a right to recover back the money paid, but he could not have enforced the contract as against the corporation.

FIGOTT, B., referred to *Fishmongers' Company v. Robertson*. (5) ]

If the defendant was not bound prior to the 7th of August he at least became bound then, for the corporation then ratified the contract by their resolution under seal. It may further be contended that the corporation, who are here acting as a local board, with power to erect markets and levy tolls, could contract without seal to let the tolls, this being one of the purposes for which they are established: *South of Ireland Colliery Company v. Waddle*. (6)

*Anstie and Mackey*, for the defendant, were not called on to support the rule.

KELLY, C.B. I think this rule should be made absolute, on the

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(1) Law Rep. 1 Ch. 35.

(2) Law Rep. 4 Ex. 162.

(3) 2 B. &amp; P. (N. R.) 247.

(4) 12 Q. B. 998.

(5) 5 M. &amp; G. 131.

(6) Law Rep. 4 C. P. 617.



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ground that there being no contract under the seal of the corporation, there was no mutuality, and that the plaintiffs cannot therefore maintain this action against the defendant. [After stating the facts of the case the learned judge proceeded :—]

The only defence to the action which we are now called upon to consider is, that there was no agreement under the seal of the corporation, and therefore no mutuality. In answer to this it is contended that the auctioneer was authorized under seal to put the tolls up to auction ; but the contract was not signed by Downton & Sons, the persons named in the resolution, but, if by any one, only by the town clerk, who is an agent of the corporation for many purposes, but who had no authority to sign this contract unless expressly authorized under seal to do so. The corporation, therefore, was not bound.

But it is argued that, although there was no contract under seal, yet there was a part performance by the defendant ; that it was, therefore, competent to the defendant, by filing a bill in equity, to enforce the performance of the contract by the plaintiffs, and then, on the authority of *Ecclesiastical Commissioners v. Merral* (1), it is contended that this gave a corresponding right to the plaintiffs to maintain the present action. I will observe at once that if it had appeared in the present case, as in that case, that the contract had been performed and carried into effect by both parties, and that the plaintiffs had had the benefit of that performance, the defendant would no doubt have been entitled to file his bill for specific performance. But the case just referred to, and all the other cases that have been cited, are cases where there has been an actual and de facto performance of the contract by one party of which the other party has taken, received, and enjoyed the benefit. And with respect to the case of *Ecclesiastical Commissioners v. Merral* (1), it must be observed, further, that it does not appear that the contract was treated as a binding contract for three years ; it was not held that a tenancy for three years had been created ; but as the corporation had handed over possession to the tenant, who had taken and retained it, and as the tenant had paid rent to the corporation, who had received it, it was held that there was a tenancy from year to year. It is further observed, in that

(1) Law Rep. 4 Ex. 162.

case, by way of a *semble*, by Kelly, C.B., that “when an individual contracts with a corporation in such a manner that the contract, though not under seal, may be enforced in equity against them, the individual is bound at law by any stipulation by him, which is made in consideration of the liability so imposed upon them.” And here, if there had been any part performance, of which the plaintiffs had taken the benefit, that might have entitled the defendant to file his bill, and so the plaintiffs might have maintained the action. But let us see what is alleged as part performance. The conditions provided that, on the tolls being knocked down to the highest bidder, he should pay a month’s rent in advance, and produce sureties, who should sign the lease. The defendant did pay a month’s rent in advance, but he was not prepared with his sureties. Now the time to be looked at is the time of the alleged breach, and that time followed immediately on the knocking down of the tolls to the defendant. The question then is, whether at that time there was any part performance which would have entitled the defendant to maintain a bill for specific performance? There was nothing until he should have performed the stipulation as to producing his sureties; and though the matter remained in fieri for some time, still the breach, if any, was committed at the time of the knocking down, and was a continuing breach until the time expired for which indulgence had been granted, and when the final non-performance on the defendant’s part took place. The question then is whether, during this time, it was competent to the defendant to file his bill. Clearly it was not so; the payment was merely conditional and provisional, and the breach was finally made when the sureties were not, after the delay, brought forward. The defendant therefore was not, at the time of the alleged breach, nor at any time before the alleged contract was finally broken, in a condition to enforce specific performance.

Let us now look at *Wood v. Tate*. (1) There a corporation had made a demise for twenty-one years, which was not under the common seal, but under which the tenant had been let into possession and had paid rent; and the action was brought for a distress put in to recover arrears of rent, the plaintiffs denying the exist-

(1) 2 B. & P. (N. R.) 247.

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ence of a tenancy. Substantially, the question was the same as in *Ecclesiastical Commissioners v. Merral* (1), and it was held, and properly held, that there had been a part performance of which the corporation had taken the benefit, and on that ground it was held that a tenancy had been created. That case is therefore no authority for the plaintiffs.

But a more serious doubt has been raised in my mind by the case of *Fishmongers' Company v. Robertson* (2), where, upon a contract not under the seal of the plaintiffs, but of which the defendants had taken the benefit, the plaintiffs were held entitled to sue. In that case Tindal, C.J., delivers an elaborate judgment (3), in the course of which he says: "Upon the general ground of reason and justice, no such answer (i.e., no such answer as the want of plaintiffs' common seal) can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is, therefore, not nudum pactum: they never can want to sue the corporation upon the contract in order to enforce the performance of those stipulations which have already been voluntarily performed; and, therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of inability to sue the corporation, which suit they can never want to maintain." The contract, therefore, was upheld on the ground of part performance; but the learned Chief Justice proceeds as follows: "It may possibly be the case that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might during that interval have the power to retract, and insist that their undertaking amounted to a nudum pactum only."

Now that was the case here at the time when the alleged breach of contract arose. At that time, to use the language of Tindal, C.J., the corporation had not "performed the stipulations on their part," and had done no act to bind them to do so; at

(1) Law Rep. 4 Ex. 162.

(2) 5 M. &amp; G. 131.

(3) 5 M. &amp; G. at p. 193.

that time, therefore, the defendant might equally say he was not bound.

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Therefore, but for what follows, our decision would be clearly consistent with all the authority upon the subject. But in the case just referred to, Tindal, C.J., did certainly use language which, though only obiter dictum, induced me for some time to pause. A little earlier in the judgment than the passage already quoted he says. (1) "Even if the contract put in suit by the corporation had been, on their part, executory only, not executed—we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal," and he refers in support of this observation to the *Mayor of Thetford's Case*. (2) Now, when that case is looked at it does not really support this dictum in any degree. That was the case of a mandamus to a corporation to which they made a return, which was objected to on the ground that it should have been sealed, but was held good on the ground that it was matter of record. There is surely a great difference between a return to a mandamus which is a matter of record, and a mere allegation by the corporation in their declaration that they had entered into a contract. There is no authority for saying that any allegation in a declaration by a corporation is binding upon them, unless it is made material by a judgment binding them as a matter of record. And in *Copper Miners of England v. Fox* (3) where this dictum was relied upon by the plaintiffs, it is completely overruled. That was an action by a corporation on an agreement for the purchase and sale of iron; the contract was in writing, but not under seal, and the objection was made that the corporation was not bound, and that there was therefore no mutuality. Lord Campbell says "The plaintiffs finally rely upon a suggestion of Tindal, C.J., in the *Fishmongers' Company v. Robertson* (1), that when a corporation have sued as plaintiffs upon a simple contract, they may possibly for ever be estopped from objecting that the

(1) 5 M. &amp; G. at p. 192.

(3) 16 Q. B. 229; 20 L. J. (Q.B.)

(2) 1 Salk. 192; 3 Salk, 103.

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contract was not binding upon them, so as to afford a remedy to the other side by cross action, and to take away the objection of want of reciprocity; but there is great difficulty in saying what shall be the form of action to which the opposite side may resort, or from what point of time the estoppel is to operate; and, after all, it would only give a remedy upon the contract where the corporation have first deemed it for their advantage to enforce it by action; the other side being left without remedy when the corporation wish entirely to break and abandon it." The dictum of Tindal, C.J., must therefore be considered as entirely unsupported.

I need only say further, that it has been argued that there has been a part performance by the plaintiffs by letting the defendant into possession; but on the evidence that allegation is entirely unfounded. Whatever was done, was done while the whole matter was still in fieri, and whilst the defendant was taking advantage of the indulgence of a few days granted him for producing his sureties; the town clerk had not only not authorized, but had forbidden the keys to be given him; the mere circumstance therefore, that the keys were in fact delivered to him, and remained in his custody for a short time, was no letting of him into possession by the deliberate act of the corporation; it was in truth a mere mistake. Nor did this so-called possession ever extend beyond a mere constructive possession, for the defendant did not enter into the market place, nor occupy it for profit or advantage, nor even attempt to take the tolls.

It was finally argued that there was a ratification of the contract by the resolution under seal on the 7th of August. But that (even supposing it to amount to a ratification, which may be doubted) came too late; it came after the breach, which is the time we must look at, and therefore cannot enable the plaintiffs to maintain this action.

PIGOTT, B. I agree with my Lord that this rule must be made absolute. I think there was no mutuality for want of the plaintiffs' seal. This was a contract which, if made by a corporation, ordinarily requires a seal, and to which the plaintiffs' seal was never affixed, for the alleged confirmation by the resolution of the 7th of August was not till after the defendant had with-

drawn from the contract (as the correspondence shews), and therefore came too late.

Then was there anything to bring the case within any established exception to the ordinary rule? It seems to me there was not. It is said that there was a part performance by payment of rent; but when the conditions are looked at, I think it was not a part performance at all, and that the money was neither paid nor received as such; it was paid as a security that the defendant would observe the conditions under which the auctioneer sold; it was to be paid before the contract could be completed by signing the agreement.

Then as to the taking of possession, which is relied upon as a kind of estoppel, it appears that, in the first place, the town clerk had no authority to give possession; that, in the second place, he did not give it; and that, thirdly, the defendant did not take it as part performance; for all that appears, he may only have been to look at the market.

That disposes of the facts of the case, and brings me to the only thing that has caused me any doubt—the dictum of Tindal, C.J., to which my Lord has already referred; but the comments of Lord Campbell on that dictum in *Copper Miners of England v. Fox* (1) have removed that doubt and leave the case free from difficulty.

Although I regret that our judgment will be to give effect to what I cannot but regard as a technicality, I think we are bound to make this rule absolute.

POLLOCK, B. I am of the same opinion. The action is brought by a corporation for breach of an executory contract, and it is open to the defendant, under the circumstances, to shew that, though it was signed by himself, it was not binding on him in consequence of the plaintiffs' not being bound.

In *Mayor of Stafford v. Tilt* (2) it is said: "Where a party has occupied land the contract between him and the landlord must be considered as executed, so that there is no necessity for alleging in the declaration any express promise to pay; from the fact of occupation a promise to pay will be implied; although in an exe-

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(1) 16 Q. B. 229; 20 L. J. (Q. B.) 174.

(2) 4 Bing. at p. 77.

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cutory contract the plaintiff must rest his case upon an express promise, and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract." It is quite clear that it did not then enter into the mind of the Court that any such proposition as that implied in the dictum of Tindal, C.J., was correct. Now it has been always said that a corporation can only act under seal, and that for that reason they must appoint agents for the transaction of their business. This is so laid down in Co. Litt. 66 b., and is referred to in Story on Agency, § 16; and it is open to every corporation to get rid of the whole difficulty by appointing an agent to act for them under seal. I think the objection is not a merely technical one. I should adopt the words of Rolfe, B., in delivering the judgment of the Court, in *Mayor of Ludlow v. Charlton* (1): "The seal is required as authenticating the concurrence of the whole body corporate. . . . The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times." I cannot imagine a case where the rule should more clearly be upheld than the present one, where we are asked to assume, in support of the defendant's rights against the corporation, a great deal which at the utmost consists only of acts of the officers of the corporation.

It is said that the case comes within one of two exceptions. First, it is said that this was an ordinary act, such as did not require a seal; but not much reliance was placed on that, and rightly. The other exception is, where there has been anything like enjoyment by the defendant who is sued by the corporation, which would estop him from saying that there was no bargain, because he had enjoyed what he had bargained for. This fails in fact, because the defendant never did occupy or enjoy, and I see no consideration which would entitle him to file his bill in equity to enforce the contract on which the plaintiffs sue. He might, perhaps, have succeeded in recovering back his deposit, but he could have done no more.

(1) 6 M. & W. at p. 823.



“ On all grounds, therefore, I think the plaintiffs fail; and in so deciding we not only act in accordance with the authorities, but give effect to a rule which is a safe guide to the public in dealing with corporations.

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*Rule absolute.*

Attorneys for plaintiffs: *Robinson & Preston, for Morton, Kidderminster.*

Attorneys for defendant: *Prior, Bigg, & Co., for Knott, Worcester.*

SPEAK, APPELLANT; POWELL AND OTHERS, RESPONDENTS.

Nov. 20.

*Tax on Carriages—Exemption—Carriages used solely for the Conveyance of any Goods or Burden in the Course of Trade—32 & 33 Vict. c. 14, s. 39, subs. 6.*

The business of a travelling circus is not a trade, and carriages belonging to a circus, and used for carrying the band and other performers in a parade through the town, are not carriages “used solely for the conveyance of any goods or burden in the course of trade,” so as to be exempt from duty under 32 & 33 Vict. c. 14, s. 19, subs. 6.

CASE stated, under 20 & 21 Vict. c. 43, by justices of the petty sessions at Bishop Auckland, Durham, on dismissing an information preferred by an excise officer under 32 & 33 Vict. c. 14, s. 27, against the respondents for keeping carriages without a licence.

By s. 18 of 32 & 33 Vict. c. 14, certain duties are imposed in respect of “carriages,” and are to be paid by licences to be taken out by the persons keeping the carriages.

By s. 19, subs. 6, “the term ‘carriage’ means and includes any vehicle drawn by a horse or mule, or horses or mules, *except* a waggon, cart, or other vehicle, used solely for the conveyance of any goods or burden in the course of trade or husbandry,” and which has the owner’s name and place of business painted on it as therein mentioned.

Sect. 27 imposes a penalty for using a carriage without a licence.

The respondents were proprietors of a travelling circus, and it was stated in the case to be part of their course of trade or business to give a daily parade of their horses and carriages through the towns which they visit.

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On the 29th of July, 1872, the respondents had their usual parade at Bishop Auckland, which they were visiting. In the procession were three carriages drawn by horses; one carried the band, the two others carried four persons each, the persons on one of the latter carriages being gaily dressed and carrying flags. These carriages were used by the respondents for carrying portions of the baggage and property of the circus from place to place, and at the time the procession took place there were in the band-carriage clothes belonging to the circus, and also the music and musical instruments of the circus, and in all three carriages some loose deal boards and brackets.

The respondents claimed to be within the exception of s. 19, subs. 6; and the justices held that they were so, on the ground that the persons carried in the carriages, in conjunction with the circus clothes, deal boards and brackets, were to be considered as a burden conveyed in the course of trade; but, at the request of the appellant, stated this case, imposing a mitigated penalty of 5*l.* in the event of the Court reversing their decision.

*H. James, A.G. (Locke, Q.C., and C. Bowen, with him),* for the Crown, after stating the case, was stopped by the Court.

*Cave (Lawrence with him),* for the respondents. The word "trade" has, according to Johnson's definition, a narrower and a wider meaning; the narrower meaning is "traffic; commerce; exchange of goods for other goods, or for money." The wider meaning is "occupation; particular employment, whether manual or mercantile, distinguished from the liberal or learned professions." (Johnson's Dict., sub voce). The narrower meaning cannot be the one intended; for this would exclude from the exception many recognised trades, such as that of a carrier, and all trades which consisted, not in selling goods, but in expending labour upon them, such as those of a dyer or a laundress. The wider meaning must therefore be intended, and the respondents' employment is thus within the definition. If so, then the carriages in question were conveying "goods or burdens in the course of trade." The word "burden" is plainly meant to include something which could not be properly called goods, and signifies anything carried; a scavenger's or contractor's cart, carrying earth or rubbish, would

carry burdens within the meaning of the exception. So persons may be burdens, as in the words, ♦Set down your venerable burden"—‘As You Like It,’ Act ii., sc. 7. There are many trades, such as that of whitawers (1), which consist in carrying labour from place to place, and in such cases the persons carried for that purpose would properly be described as burdens carried in the course of trade. So here the persons carried, as well as the articles mentioned, were burdens conveyed; and they were so conveyed “in the course of trade.” This is stated as a fact in the case, and is rightly so stated. The words “course of trade” must be construed with reference to the nature of the trade carried on, and the words cannot mean less than to include everything which is done in the ordinary course of carrying on the trade in question, and is conducive to that object. With a spectacular business like that of a circus, the parade through the town is as much a part of the business as the performance within the tent or building.

[BRAMWELL, B. Would a traveller going about in a gig to solicit orders be a burden carried in the course of trade?]

It is contended that he would.

KELLY, C.B. I am of opinion that the respondents have not succeeded in shewing themselves to be within the exemption, if we are to take the words of the statute, as we must take them, according to their ordinary meaning. These carts or waggons cannot be properly said to have been conveying any “goods or burden” of the respondents in the course of their trade. I may give as an illustration of the meaning of the statute—the case of a coal merchant sending his carts or waggons to fetch coal to his yard, or to convey it to his customers, or a wine merchant, or other tradesman similarly supplying goods in the ordinary course of business. Now, in the first place, I think the occupation of the respondents is not a trade at all, but rather resembles a profession, consisting in the exercise and exhibition of special personal faculties and endowments. It is certain that no actor, nor any person exhibit-

(1) “*Whitawer*,” a collar-maker, or maker of husbandry harness. A.-Sax. *hwit-tawer*, a dresser or worker of white or whitleather.—Baker’s Northamptonshire Glossary, sub voce. In the same

work “whitleather” is described as “untanned leather made from horses’ hides, and used for hedge mittens, and whitleather thongs.” Whitawers were stated by Cave to be itinerant.

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ing (like the respondents) gymnastic feats in public, nor even the proprietor of a theatre, would be a trader within the meaning of the Bankruptcy Act now in force, or any earlier Bankruptcy Act; nor do I think they are such within the meaning of the Act before us. But, in the second place, these carts and waggons were clearly not being used "solely" for the purpose of conveying goods or burdens. This parade was not a carrying on of the respondents' business, but a show or spectacle, intended as an advertisement of how they carry it on, and the things that were conveyed in the carts were not conveyed for the purpose or in the course of their business, but either for the purpose of the show or spectacle, or for no purpose whatever. Our judgment must therefore be for the Crown.

BRAMWELL, B. I am of the same opinion. First, I think this was not a "conveyance of any goods or burden in the course of trade;" by which I understand to be meant that the goods or burdens are goods or burdens by the conveyance of which the trade is carried on. I cannot think that in the case I put during the argument, of a person carrying on his trade by means of sending out a traveller in a gig to obtain orders, the gig would be exempted, on the ground that the traveller was a "burden" conveyed in the course of trade. Mr. Cave has put several ingenious instances, which it is not easy to answer; but however some of those cases ought to be decided, I have no doubt that the present case is not within the exemption. Further, it is clear that this was not a conveyance of the goods "solely" in the course of trade. This "parade," as it is termed, rather resembled the carts we sometimes see in the streets, covered with pictures or placards, and drawn about as an advertisement. On both grounds I think the respondents fail.

PIGOTT and POLLOCK, BB., concurred.

Attorney for the Crown: *The Solicitor of Inland Revenue.*

Attorney for respondents: *Bell.*



THE ATTORNEY GENERAL *v.* LOMAS.

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Nov. 20.

*Probate Duty—Absolute Trust for the Conversion of Land—Heir taking  
undisposed-of Interest in Realty.*

When a will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitations of the proceeds contained in the will, the testator's heir takes the undisposed-of interest, he takes it as money, and on his death probate duty is payable upon it, although the land still remains unsold.

C. J. B. by his will directed his real estate to be converted, and the proceeds, with his personalty, to be held in trust for the payment of debts and legacies, and, as to the residue, on certain trusts which failed. The testator's heiress, M. B., became, by reason of the failure of the last-mentioned trusts, entitled to the proceeds of the real estate. She died under twenty-one, and at the time of her death the real estate was unsold :—

*Held*, that the interest which M. B. took as heiress of C. J. B. was taken by her as money, and that probate duty was payable by her administrator in respect of it.

INFORMATION claiming probate duty from the administrator of Margaret Buckley under the following circumstances :—

C. J. Buckley, by his will dated the 22nd of September, 1863, after bequeathing certain specific and pecuniary legacies, devised all his real estate (except mortgages) to trustees on trust to sell the same at such time or times as the trustee or trustees for the time being of his will should in their or his discretion deem expedient, with power to sell any part for a ground rent, to be secured on the land sold, and to be settled subject to the same trusts and provisions, including the trusts for sale, as the premises so sold; and bequeathed the residue of his personal estate to the same trustees upon trust to convert the same into money (with power at discretion to continue any securities included in the description of securities thereafter directed). And as to the moneys arising from the sale of the said real and residuary estates, or constituting the same, after payment of his debts, funeral and testamentary expenses, and the payment of the several legacies therein bequeathed, upon trust to invest the said moneys in the securities therein mentioned, and to hold all the said trust moneys, stocks, funds, and securities, and the interest and income thereof, in trust to pay his wife an annuity of 100*l.* for her life, and as to the residue of the said trust moneys, stocks, funds, and securities, and the interest

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and income thereof, and also as to the sum (if any) set apart to secure the said annuity, after the ceasing of the annuity, in trust for all his children living at his decease, and such of the issue then living of any child or children dying in his lifetime as, either before or after his decease, had attained or should attain twenty-one, or, if a female, had been or should be married, as tenants in common per stirpes; and the testator declared that, if there should be no child of his who should attain twenty-one, nor any issue of any child dying under that age, who should be living in the lifetime of any child, and should attain twenty-one, then, from and after such default or failure of children and issue of such children as aforesaid, he bequeathed the said trust moneys, stocks, funds, and securities, as to the sums of 3000*l.*, 1000*l.*, and 1000*l.*, to his brother W. L. Buckley and his sisters M. L. Buckley and C. Buckley respectively. And as to all the rest, residue, and remainder thereof, and generally of all his estates and effects not otherwise disposed of, he gave, devised, and bequeathed the same to the trustees or trustee for the time being of his will, in trust for the child, or for the children equally, of his brother R. B. Buckley then living, and such issue then living of his said child or children then deceased as should attain twenty-one or marry, as tenants in common per stirpes. And the will contained a proviso that the testator's unsold real estate and outstanding personal estate should be subject to the trusts thereinbefore contained concerning the moneys, stocks, and securities aforesaid, and that the rents and yearly produce thereof should be deemed annual produce for the purposes of such trusts, and that such real estate should be transmissible as personal estate under the trusts thereinbefore contained; and also contained powers, until sale, to manage the estate and to raise money on mortgage for the purposes of the trust, and also to invest moneys in the purchase of lands to be held by the trustees upon and for the like powers and provisions as to sale and conversion and otherwise as the real estate devised, and also, with the consent in writing of all his children then living and of the age of twenty-one, instead of selling any part of his estate, to appropriate such part in or towards satisfaction of any share or legacy thereby given to or in favour of any of his children or issue.



The testator died on the 6th of May, 1865, having had one child only, Margaret Buckley, who died on the 8th of February, 1871, an infant and unmarried.

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The testator's brother R. B. Buckley was still living, and had had only one child, who died in 1860, an infant and unmarried.

Margaret Buckley was the testator's heiress-at-law, and one of his next of kin.

The testator owned, at the time of his death, real estate which, at the time of Margaret Buckley's death, had not been sold or contracted to be sold, but which had since been sold for the sum of 3825*l.*, and that sum had been paid to her administrator, and included by him in his residuary account.

The Crown claimed probate duty from the administrator of Margaret Buckley on this real estate, as being in equity to be treated as absolutely converted into personalty.

*H. James, A.G.*, and *W. W. Karslake*, for the Crown. The limitations of the will in favour of the testator's children failed, no child having lived to attain twenty-one or having married. The limitations to the children of R. Buckley failed also, there being no child, nor the issue of any child, of R. Buckley living at the death of Margaret Buckley. Subject, therefore, to the payment of the debts, funeral and testamentary expenses and legacies, the testator's property went, so far as it consisted of realty, to Margaret Buckley as his heiress-at-law. But what was the character of the property as she took it, and as it passed upon her death to her representatives? There was an absolute trust for conversion, by reason of which the real estate was converted into personalty: *Fletcher v. Ashburner*. (1) It is true that a direction to convert does not operate to change the course of descent or devolution from the testator further than is necessary to effectuate the purposes of the will: *Ackroyd v. Smithson* (2); *Countess of Bective v. Hodgson* (3); *Jessopp v. Watson* (4); but it affects the character of the property. If the purposes of the will for which conversion was directed wholly fail, so that it is unnecessary to convert the land, or where there is merely a discretionary power to convert, the heir will take

(1) 1 Wh. &amp; T. L. C. (4th ed.) p. 826.

(3) 10 H. L. C. 656.

(2) 1 Wh. &amp; T. L. C. (4th ed.) p. 872.

(4) 1 My. &amp; K. 665.

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that which descends to him as land, even though it may have been actually converted : *Davenport v. Coltman* (1); *Bourne v. Bourne*. (2) But where there is an absolute direction to convert, and only a discretion given as to the time and mode of conversion, or where the proceeds of the realty and personalty are to form a joint fund for the purposes of the will, this direction impresses the land with the character of money, and it is taken as money by the heir : *Jessopp v. Watson*. (3) Land, therefore, which a will absolutely directs to be converted, and which comes to the heir through failure of some of the purposes for which the conversion was directed, forms part of his personal estate, unless he has had the opportunity of electing, and has elected, to take it as land and not as money : *Pulteney v. Darlington* (4), and is, on the principle of *Attorney General v. Brunning* (5), liable to probate duty; and in general, if an absolute and positive trust for conversion is created, this effect takes place whether the land has or has not been sold at the time of the death of the person whose estate is in question : *Williamson v. Advocate General*. (6) The only two cases which seem opposed to this view are *Matson v. Swift* (7) and *Custance v. Bradshaw* (8); but in the former of these cases the deed which was relied on as producing the effect of conversion was a voluntary deed of the testator, which remained subject to his directions, and which had in fact never been acted on; and in the latter case there was nothing to compel a conversion, and the partners, of whom the deceased was one, had in fact elected to treat the land as land by taking a conveyance to themselves as tenants in common. (See the comments of James, V.C., on this case in *Forbes v. Steven*. (9) ) Now in the present case it is clear that a conversion of the land into money is absolutely directed, and is necessary for effecting the purposes of the will; for although the ultimate limitations of the fund have failed, the charge of the debts, legacies, &c., upon the fund remains good. One joint fund is created out of the personalty and the proceeds of the realty; out of that fund these payments are to be made, and it is therefore

(1) 12 Sim. 588, 610.

(2) 2 Hare, 35.

(3) 1 My. &amp; K. 665.

(4) 1 Bro. C. C. 222.

(5) 8 H. L. C. 243; 30 L. J. (Ex.) 379.

(6) 10 Cl. &amp; F. 1.

(7) 8 Beav. 368.

(8) 4 Hare, 315.

(9) Law Rep. 10 Eq. at p. 191.

necessary, for the purpose of adjusting the rights of the next of kin and the heiress, that the land should be sold. Nor could any one have claimed to restrain the sale or elected to take the land as land, except by combining the rights of Margaret Buckley and the rest of the next of kin, and it is equally clear that, even if Margaret Buckley had ever had the right to elect, she never had the capacity for its exercise.

Some expressions used in *Forbes v. Steven* (1) and *De Lancy v. Reg.* (2) may at first sight seem favourable to the defendant, but those cases only refer to legacy duty. That the actual state of the property is not decisive is clearly established by *Attorney General v. Brunning* (3) and *Williamson v. Advocate General*. (4) The question is really solved by considering what it was that Margaret Buckley was entitled to as the heiress of C. J. Buckley. Was it land, or the produce of land? Clearly not land, but only its produce.

*Philbrick* (*Sir J. B. Karlake, Q.C.*, with him), for the defendant. To determine whether probate duty is payable, the character of the property at the time must be considered. Per James, V.C., in *Forbes v. Steven*. (1)

It cannot be maintained that it was necessary for the purposes of the will that the conversion should take place; the debts and legacies were primarily chargeable on the personal estate, which is not shewn to be insufficient: *Chitty v. Parker*. (5)

No reply was called for.

KELLY, C.B. I am of opinion that the Attorney-General is entitled to the judgment of the Court. Whatever doubt may have occurred on the point has been set at rest by a series of decisions, which have been uniformly to the effect that when real property is expressly directed by will to be sold, and the proceeds are, with the personalty, to form one fund, the land, though unsold at the time when any person entitled to an interest in the joint fund dies, is nevertheless to be treated as money for the purpose of probate duty. The cases referred to clearly point out and establish a distinction in the operation of trusts for conversion contained in a

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(1) Law Rep. 10 Eq. 178, at p. 185.

(2) Law Rep. 5 Ex. 102.

(3) 3 H. L. C. 243; 30 L. J. (Ex.) 379.

(4) 10 Cl. & F. 1.

(5) 2 Ves. Jun. 271.

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will, both for the purpose of the devolution of the property and for the purpose of probate duty. If the land remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as land, and devolves according to the rules governing the descent of real estate; but when there is a legal obligation to sell, and the proceeds are to form a portion of a joint and single fund for the purposes of the will, then, whatever may be the condition of the property at the time of the death of the heir taking the undisposed-of interest, it is, both for the purpose of devolution and for the purpose of probate duty, to be considered as money. Without referring further to the cases cited, the case of *Attorney General v. Brunning* (1) is clear and conclusive on this point. It is observed by James, V.C. in *Forbes v. Steven* (2) that the liability to probate duty depends on the character of the property at the time; but when the character of the property is changed by the positive direction of the will, the Crown is entitled to both probate and legacy duty by virtue of the character so impressed on the property.

Now, looking at this will, there can be no reasonable doubt as to its effect; the testator, in the first place, positively directs his real estate to be converted into money, and the proceeds, with the proceeds of the residuary personal estate, to be applied, after payment of his debts, in the payment of several legacies, with certain ultimate trusts of the residue which never took effect. The whole is constituted one entire fund. No person entitled to anything under the will could have prevented the trustees from selling, or relieved them of their absolute liability and obligation to sell; the whole, therefore, is stamped with the character of money.

With regard to the cases of *Matson v. Swift* (3), and *Custance v. Bradshaw* (4) referred to for the defendant as qualifying the effect of the cases relied on by the Crown, the distinction has been already pointed out. In *Matson v. Swift* (3) an authority was given to sell, but no obligation to do so was imposed on the trustees; and so in *Custance v. Bradshaw* (4) there was nothing

(1) 3 H. L. C. 243; 30 L. J. (Ex.) 379.

(2) Law Rep. 10 Eq. 178, at p. 185.

(3) 8 Beav. 368.

(4) 4 Hare, 315.



rendering it obligatory on those who had to administer the estate to convert the land.

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The case of *Chitty v. Parker* (1), which was also referred to by the defendant is obscurely reported, but from the judgment of the Lord Chancellor it appears that "it was agreed on all sides that the Court is not to execute this will in toto, that the real estate is not to be converted into money, in order to have the quality of money, and to go as money." The Chancellor must, therefore, have seen from the will before him that there was no positive direction in the will to convert, and the case therefore contains nothing inconsistent with the decision which we pronounce in the one before us. On these grounds our judgment must be for the Crown.

BRAMWELL, PIGOTT, and POLLOCK, BB., concurred.

*Judgment for the Crown.* (2)

Attorney for the Crown: *The Solicitor of Inland Revenue.*

Attorney for defendant: *Dunster.*

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THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY v.  
GIDLOW.

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Nov. 5.

*Costs—Interest upon Judgment for Costs in Cause—Interest upon Costs in Courts of Appeal.*

By a rule of Trinity Term, 1867, it is ordered that on appeal from one of the Superior Courts, such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in appeal for the delaying thereof:—

*Held*, that in a case where a defendant had obtained judgment for his costs, against which judgment there had been unsuccessful appeals to the Exchequer Chamber and House of Lords, interest could be allowed only upon the sum for which judgment was originally obtained in the Court below, and not upon the costs of the appeals.

In this case judgment for his costs was given for the defendant in this court. The plaintiffs appealed to the Court of Exchequer

(1) 2 Ves. Jun. 271.

(2) No question was raised as to the amount to be deducted from the value of the interest in the real estate taken

by Margaret Buckley by reason of the charge of debts and legacies on the joint fund.

1873 Chamber, who affirmed the judgment with costs. Thence the  
 LANCASHIRE plaintiffs appealed to the House of Lords, who affirmed the judg-  
 AND ment of the Court of Exchequer Chamber, and directed the plain-  
 YORKSHIRE tiffs to pay such sum for costs as the taxing officer of the House  
 RAILWAY Co. should fix. (See order of House of Lords, April 3, 1853.)  
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Subsequently, Honyman, J., made an order at Chambers that interest should be computed and paid to the defendant upon the sum for which judgment was given in the Court of Exchequer from the date of the judgment until satisfaction.

*Holker, Q.C.*, moved for a rule calling on the plaintiffs to shew cause why this order should not be varied by directing that interest should be computed and paid to the defendant upon the whole of the costs incurred by him, including the costs in the Exchequer Chamber and House of Lords. The judgment here is for the defendant's costs in the cause, and proceedings in error or on appeal are a "step in the cause:" Common Law Procedure Act, 1852, s. 76; and the costs of the appeal are costs in the cause. By rule 26 of Trinity Term, 1853, it is provided that on error from one of the Superior Courts, such court shall have power to allow interest for such time as execution has been delayed by the proceedings in error for the delaying thereof, and this rule is applied to appeals by *Regula Generalis*, Trinity Term, 1867. These provisions are similar to that of 3 & 4 Wm. 4, c. 42, s. 30, which enacted that the Court of Error should allow interest for the time during which execution was delayed. But the interest ought to be calculated upon the whole costs, otherwise the defendant does not get the full benefit of the rule.

KELLY, C.B. There should be no rule in this case. By 3 & 4 Wm. 4, c. 42, s. 30, it was enacted that "if any person shall sue out a writ of error upon any judgment whatsoever given in any court in any action personal and the Court of Error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof." Writs of error are now abolished, and error is a "step in the cause;" and this court has now, upon error being brought, a similar power of awarding



interest by virtue of the 26th rule of Trinity Term, 1853 ; a power which was by the Regula Generalis of Trinity Term, 1867, extended to the case of an appeal. But this interest is for the delay in execution, and must be interest upon the sum for which judgment has been originally given. It is now contended that where a defendant obtains judgment for costs, then, in case of an unsuccessful appeal by the plaintiff to the Exchequer Chamber and House of Lords, the defendant is entitled to recover interest, not only on the costs of the cause for which his judgment in the court below was, but also on the costs of the cause, including the costs of the appeals. I do not think this is the true construction of the rule of Trinity Term, 1867. With regard to the House of Lords, the sum awarded for costs is entirely in their discretion. They may affirm a judgment without costs, or with an amount for costs to be fixed by an officer of the House, or they may give a fixed sum, not by the name of costs, but in satisfaction of them. I cannot find any statute enabling this Court to interfere and give interest on that sum. Again, where the Exchequer Chamber affirms a judgment of the Court below with costs, I cannot find any enactment which would warrant this Court in including in the sum on which interest is to be given the costs of the appeal.

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MARTIN, B. Costs awarded in the Exchequer Chamber and House of Lords cannot bear interest, unless by statute ; and there is no statute empowering this Court to give interest upon such costs. I therefore agree that there should be no rule.

PIGOTT, B. I am of the same opinion. Our power to give interest is limited by the 26th rule of Trinity Term, 1853, which was applied to appeals by the rule of Trinity Term, 1867 ; and I do not think that we are thereby enabled to give interest upon anything but the amount for which judgment was originally obtained in the court below.

*Rule refused.*

Attorneys for defendant : *Chester, Urquhart, & Co.*

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Nov. 19.

CHARLESWORTH AND ANOTHER *v.* HOLT.

*Separation Deed—Husband and Wife—Covenant to pay Annuity—Subsequent Divorce—22 & 23 Vict. c. 61, s. 5.*

By a separation deed reciting that differences existed between the defendant and his wife, and that they had agreed to separate, the defendant covenanted with trustees to pay them an annuity for his wife's support "during their joint lives and so long as they should live separate and apart." The deed contained clauses which indicated that the parties to the deed contemplated that the marriage relation would continue to exist between the defendant and his wife. In an action by the trustees for arrears of the annuity :—

*Held*, that a plea setting forth the deed and alleging the wife's subsequent adultery, and the dissolution of the marriage in consequence, was bad, there being no express words limiting the defendant's obligation to the period during which the marriage tie subsisted.

*Quære*, whether 22 & 23 Vict. c. 61, s. 5, applies to deeds made before the passing of the Act.

DECLARATION on the breach of a covenant by the defendant with the plaintiffs, to pay them an annuity of 63*l.* in quarterly instalments, for the separate use of Lucy Holt, the defendant's wife, during the joint lives of the defendant and Lucy Holt, and during so long as they should live separate and apart.

Plea, setting out verbatim the deed, which was dated on the 17th of December, 1858, and purported to be made between the defendant of the first part, Lucy Holt, his wife, of the second part, and the plaintiffs of the third part: [By this deed, after reciting that differences subsisted between the defendant and Lucy "his wife," by reason whereof they had agreed to live separate and apart for the future, that in consideration of the premises and by way of making provision for Lucy Holt "during so long time as they shall live separate and apart," the defendant had agreed to allow "the said Lucy Holt, his wife, during the joint lives of himself and his said wife, and so long as they shall live separate and apart" the yearly sum of 63*l.*, that in case of defendant's death before that of Lucy, his executors should pay her the sum of 63*l.* as soon as conveniently might be, and "in case the said Lucy Holt his wife should die" before the defendant, that then he should pay the plaintiffs 15*l.* towards her funeral expenses; the defendant, in pursuance of the recited agreement, covenanted to pay the agreed

annuity during the joint lives of himself and Lucy Holt, "and during so long time as they should live separate and apart," and that, in case of her dying before the defendant, then the defendant, "her husband," would pay the plaintiffs 15*l.* towards her funeral expenses; that notwithstanding the marriage it should be lawful for the said Lucy Holt at all times to live apart from the defendant, "as if she were sole and unmarried;" that he would not take proceedings to compel a return to cohabitation; that it should be lawful for Lucy to have for her separate use "notwithstanding her coverture," all jewels, &c., bequeathed or given to her; that if she died first the defendant would allow her will (if any) bequeathing her separate property to be proved by the executors therein named, or if there were none, or she died intestate, would allow administration of her separate property to such persons as would be entitled if he were dead and would permit them to distribute it amongst her next of kin; and the plaintiff Charlesworth covenanted with the defendant that Lucy Holt would not take proceedings to compel a return to cohabitation and undertook to indemnify him against all debts incurred by Lucy Holt whilst she was living "separate and apart from her said husband."] The plea then alleged that after the execution of the said deed Lucy Holt committed adultery, and thereupon the defendant commenced a suit for dissolution of the marriage, and the marriage was dissolved by the decree absolute of the Divorce Court, and the payments sued for accrued due after the dissolution.

Demurrer and joinder.

*Herschell, Q.C.* (*T. Atkinson*, with him), in support of the demurrer. The deed continues to operate, although the marriage is dissolved. No doubt the parties to it contemplated that the marriage tie would continue to exist, but they have used no words to limit their obligation to that period. In *Baynon v. Batley* (1), it was held that the wife's adultery after separation was no answer to a covenant to pay a trustee a separate maintenance for the wife. So in *Jee v. Thurlow* (2) a plea stating that the wife had been divorced *à mensâ et thoro*, was held no defence to an action by the trustee for arrears.

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The Court of Chancery will not set aside a separation deed after a divorce: *Evans v. Carrington*. (1) In *Goslin v. Clark* (2), a dissolution of marriage on the ground of adultery was held no answer to an action for arrears of an annuity under a separation deed. Moreover such a deed is within the scope of 22 & 23 Vict. c. 61, s. 5, and can be dealt with by the Divorce Court, *Worsley v. Worsley*. (3)

[BRAMWELL, B. That Act was passed after the date of this deed.]

The Act seems to be applicable to all then existing as well as to future deeds.

*Holker, Q.C. (K. Digby, with him), contra.* The deed from beginning to end contemplates the continuance of the marriage, and the covenant should be read as limited to the period during which Lucy Holt is the wife of the defendant and is living apart from him. The question is one of construction. In the cases referred to, the covenant to pay was absolute; but here the period of payment is limited. The 22 & 23 Vict. c. 61, s. 5, cannot apply to deeds executed before it was passed. The result, therefore, of holding the plea no answer will be to impose upon the defendant the burthen of paying an annuity to the plaintiff for the rest of Lucy Holt's life, and also of contributing to her funeral expenses if she dies first, although she is now in the position of a stranger to the defendant.

*Herschell, Q.C.*, was not called on to reply.

KELLY, C.B. I think the plaintiffs are entitled to our judgment. The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the Court to add such a term to the contract. If the contract were to be so construed, it would be possible for the husband, by giving grounds

(1) 2 D. F. & J. 481; 30 L. J. (Ch.) 364.      (2) 12 C. B. (N.S.) 681; 31 L. J. (C.P.) 330.

(3) Law Rep. 1 P. & M. 648.



to his wife for a petition for divorce against him, to put an end to his liability. Suppose, for example, he were guilty of adultery and desertion, and the wife obtained a decree for dissolution, he would be freed by means of his own misconduct. We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract.

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BRAMWELL, B. I am of the same opinion. Mr. Holker does not ask us to imply the condition he contends for, but to hold that the language of the deed itself in effect expresses that it is only to operate so long as the marriage remains undissolved. Now a man who becomes a party to such a deed as this, the object of which is once for all to provide for the wife during the separation, could by unmistakeable words limit his liability to the period during which the marriage relation continues. Mr. Holker contends that the covenant is only operative as long as the parties live apart and the status of husband and wife exists between them. But I think the husband's covenant is absolute; and even in case of the husband and wife resuming cohabitation, the trustees would be entitled to insist upon payment of the annuity, were it not for the clause which limits the obligation to such time as they shall live apart from each other.

There are, no doubt, expressions in the deed which seem to contemplate the continuance of the marriage. Thus the parties throughout are described as "husband" and "wife"; the husband, in case of his wife dying first, is to pay 15*l.* towards her funeral expenses, and is not to interfere with her testamentary disposition or with the distribution of her separate property. From these and other clauses it is plain that a divorce was not in the contemplation of either party; but I nevertheless see nothing to restrict the operation of the defendant's covenant, except the single condition that Lucy Holt and himself shall be living separate and apart. If they had come together again there would be no liability on his part to continue to pay the annuity to the trustees. But except in that event his liability continues. Surely it would be a strange result that, as my Lord pointed out, the husband could release himself from liability by such misconduct as would justify his wife in applying for a divorce. It might be



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said indeed that in such a case she would elect to apply at the risk of losing the benefit of this covenant. But we ought not, in the absence of express words, so to construe the covenant as to deprive the wife of the benefit of it unless she consents to allow her husband's misconduct to pass unnoticed.

I should add that I do not think the case of *Worsley v. Worsley* (1) can be relied upon by the plaintiffs in support of their argument, as this deed is dated prior to the passing of 22 & 23 Vict. c. 61, s. 5, and I am not prepared to hold that that enactment applies to any deeds except those executed after it was passed.

PIGOTT, B. I am of the same opinion. We cannot imply the term contended for by Mr. Holker, and although there are expressions in the deed which indicate that neither party contemplated the dissolution of the marriage, I do not think that upon dissolution the defendant's liability was at an end. He covenants to pay this annuity absolutely so long as he and Lucy Holt live apart. Their coming together again is the only event on which the payment is to cease.

*Judgment for the plaintiffs.*

Attorneys for plaintiffs: *Edwards, Taylor, & Jaques.*

Attorney for defendant: *Joseph Reed.*

Nov. 25

PRETTY v. NAUSCAWEN AND ANOTHER.

*Practice—Notice of Trial—Taking short Notice of Trial “if necessary”—  
 Meaning of “if necessary.”*

Where a defendant is under terms to take short notice of trial “if necessary,” the plaintiff is entitled to give such notice if he cannot, using reasonable diligence, give full notice, although the regular course of pleading was not such as to render short notice necessary.

THIS was a rule to set aside a verdict for the plaintiff, on the ground (among others) that there had been no valid notice of trial. The action was in trover for a yacht, and the declaration was delivered on the 13th of June last. The defendants obtained

(1) Law Rep. 1 P. & M. 648.

three several orders for time to plead, and on the 5th of July they obtained a further order, giving them till noon on the 7th of July, on the terms of their "pleading issuably, rejoining gratis, and taking short notice of trial if necessary for the next assizes." The venue in the action was Kent, and the commission day at Maidstone being the 21st of July, the last day for giving full notice of trial was the 11th of July. The defendants, complying with the order, delivered their pleas on the 7th, but the plaintiff did not deliver replication until the 14th, and with it he gave short notice of trial for the assizes at Maidstone. The defendants' attorney informed the plaintiff's attorney that this notice was irregular, and would not be attended to. The case was accordingly taken as undefended, and a verdict passed for the plaintiff.

A member of the firm of attorneys who acted for the plaintiff filed an affidavit to explain the delay in delivering the replication and notice of trial. In it he said that on receipt of the pleas he sent them at once to a pleader, and continued: "I was not able to get back the replication from him until too late to deliver the same on the 11th day of July last, which was the last day for giving full notice of trial, but I delivered the same on the following Monday, the 14th day of July last, and the same was sent out in time to be, and was, I believe, delivered to the defendants' attorneys before two o'clock in the afternoon of that day." Other affidavits were used, to which it is unnecessary to refer, disclosing circumstances which it was submitted entitled the defendants to a new trial.

*Willis* shewed cause, and cited *Drake v. Pickford*. (1)

*Day, Q.C.*, and *W. G. Harrison*, in support of the rule, argued that the words "if necessary," must mean, if the course of pleading rendered the short notice necessary. Here the plaintiff had four days in which he could have replied, and as that was the time in which he might have been ruled to reply, it must be taken to be sufficient, and the short notice was not good. This would make a fixed rule, but if any other rule were adopted, the attorney for the defendant would never know when he delivered

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pleas whether he must make ready for the trial or not. The plaintiff could have given the ten days' notice, and should have done so: *Flowers v. Welch*. (1)

THE COURT (Kelly, C.B., Bramwell and Pollock, BB.) held that the rule laid down by Alderson, B., in *Drake v. Pickford* (2) was correct. The term "if necessary," must be taken to mean "if the plaintiff, using reasonable diligence, cannot give full notice," and was not to be construed solely with reference to the course of pleading. In this case reasonable diligence was used, and the notice was therefore sufficient. The affidavits, however, disclosing facts entitling the defendant to a new trial, the rule would be made absolute on payment of costs.

*Rule absolute.*

Attorneys for plaintiff: *Evans, Laing, & Eagles*.

Attorneys for defendant: *Clarke, Son, & Rawlings*.

(1) 9 Ex. 272; 23 L. J. (Ex.) 7.

(2) 15 M. & W. 607, at p. 608.

# CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXVII VICTORIA.

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TOWNE v. COCKS.

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*Interrogatories—Discovery of Title—Character of Defendant's Title—Quality of his Possession—Tithe Rent-charge—Apportionment Agreement—6 & 7 Wm. 4, c. 71.*

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Jan. 23.

Where the defendant's title to a hereditament is in controversy, interrogatories as to the character of his title and the quality of his possession will be allowed, although interrogatories as to the mode in which he proposes to prove his title would be inadmissible.

The plaintiff, who was the rector of a parish, claimed in an action for money had and received against the patron of the living, one half of the rent of the churchyard and of the tithe rent-charge which had been received by the patron since the plaintiff's induction. The defendant having pleaded a title by prescription, and also, as to the rent-charge, an agreement under 6 & 7 Wm. 4, c. 71, whereby it was agreed that the tithes should be commuted, and that the substituted rent-charge should be received in equal shares by the then rector and himself, the plaintiff was permitted to administer interrogatories as to the period for which the defendant and his predecessors had received the rent and tithes, or tithe rent-charge, and as to the circumstances under which they had so received them.

THIS was a rule calling on the plaintiff to shew cause why an order of Martin, B., allowing certain interrogatories, should not be varied or rescinded.

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The declaration was for money had and received, and the plaintiff, who was rector of the parish of Middleton St. George, sought to recover from the defendant, who was patron of the living, one half of the rent of the churchyard and of the tithe rent-charge which had been, as it was alleged, wrongfully received by the defendant since the induction of the plaintiff. The defendant pleaded, among other pleas, a title by prescription to the half of the rent and rent-charge in question; and as to the rent-charge, he also pleaded an agreement between one of the plaintiff's predecessors, himself, and the other landowners of the parish, duly made and confirmed, under the Tithe Commutation Act (6 & 7 Wm. 4, c. 71), whereby a rent-charge was substituted in lieu of tithes and directed and agreed to be paid in equal shares to the plaintiff's predecessor and himself. Upon a summons to administer interrogatories, Martin, B., allowed the following amongst others:—

“(2.) At the time you became patron of the said rectory or living of Middleton St. George, who was the rector thereof? Did you at the time of your becoming patron as aforesaid, or immediately, or when afterwards, receive one half, or any other, or what portion of the rent or moneys derived from the letting of the churchyard of the said parish, or one half, or any, and what portion of the produce, or value of the produce of the said churchyard? If yea, state for how many years, and from whom, and under what circumstances, and by what authority you have received the same. Set forth a full account of the sums of money, or of the amount of the produce or value of the produce you have so received, and the date or dates of such receipt or receipts of such moneys, produce, or value of produce.

“(3.) Did you, at the time of your becoming patron of the said living, or immediately or when afterwards, receive one half, or any other and what portion of the tithes or tithe rent-charge paid in the parish? If yea, state for how many years, and from whom, and under what circumstances, and by what authority you have received the same. Set forth a full account of the tithes, or sums of money in respect of tithes or tithe rent-charge you have so received, and the date or dates of such receipt or receipts, and state if any and what tithes or portion thereof were received by



you before the tithes were commuted, and from whom and under what circumstances, and by what authority; and, before such commutation, to whom and under what circumstances did you pay or cause to be paid the tithes issuing and payable in respect of your own lands in such parish, and whether you paid the full tithes, or what proportion, and if a proportion, why a proportion? When did your ancestors and predecessors in title first receive the one half of the said tithes, and what were the names of such ancestors and predecessors, and when did they first respectively receive the same, and when did they respectively die? Were any, and which of them, laymen?"

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*Arthur Charles* shewed cause. The defendant here sets up a prescriptive title, and also a title under an agreement with the plaintiff's predecessor, in pursuance of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71). The plaintiff ought, therefore, to be allowed to inquire the period during which the defendant has been in possession of the rent of the churchyard and of the tithe rent-charge; and as to the latter, whether before commutation the defendant received half the tithe in kind. Interrogatories framed to elicit this information are not objectionable as seeking to discover the nature of the defendant's title.

[KELLY, C.B. The words "by what authority" in the interrogatories might make it necessary for the defendant to disclose, not only the character of his title, but the way in which he proposed to establish it.]

If that be so, the plaintiff would be content to strike out the words.

[POLLOCK, B., referred to *A.G. v. Corporation of London* (1), where a distinction is drawn between a discovery of the means of proving a title and of the character of the defendant's title, and the quality of his possession.]

These interrogatories, at all events if the words "by what authority" are omitted, are strictly in accordance with the rule laid down in that case where indeed a far more extensive discovery was ordered than is asked for here.

*Crompton* in support of the rule. The interrogatories are in

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substance an inquiry into the defendant's title, and cannot be answered except by disclosing it. They are not relevant to the plaintiff's case, which is rested upon the fact that he is "rector" of the parish, and as such entitled to all the tithe and churchyard produce: and *prima facie* he would no doubt be so entitled. In this case, however, the defendant proposes to shew, in answer, a prescriptive right to half the tithe and rent, and an agreement made thirty-seven years ago as to the rent-charge apportioned on the parish. In other words, he asserts that the plaintiff though nominally a "rector," is only rector as to half the profits of the living. Such a state of things is unusual, but not unique. There are several instances, especially in the North, of double rectories, one of which is spiritual and the other impropriate. The information asked for exclusively concerns the defendant's, and cannot be necessary for the plaintiff's case. As to so much of the third interrogatory as refers to the defendant's ancestors, that can only be answered by a disclosure of the contents of his title deeds.

[KELLY, C.B. Why so? You are only asked the names of your predecessors, and whether they in fact received the tithe.

PIGOTT, B. So far as the question cannot be answered except by disclosing your deeds, you might object to answer it. But that is no reason for disallowing the question.]

At all events, the interrogatories are too wide; and, if allowed at all, should be strictly limited to ascertain the character of the defendant's title, and should not require him to state his means of proof.

KELLY, C.B. I am of opinion that this rule should be discharged, the interrogatories being modified by striking out from each the words "by what authority." With this amendment they seem to me to be unobjectionable. The defendant would be entitled to object to answers as to the manner in which he intends to prove his title. But he cannot refuse, in such a case as the present, to disclose the period for which he has been in possession of the half of the churchyard rent and tithe rent-charge, and whether or not he or his predecessors were in receipt of the same proportion of the rent and tithe before the commutation agreement, upon which, in one of the pleas, reliance is placed.

PIGOTT, B. I think the learned judge was right in allowing these interrogatories, and—except by striking out the words “by what authority”—we ought not to vary his order. The defendant claims the half tithe rent-charge in question under an alleged tithe commutation agreement, made in the year 1837, between a deceased rector and himself. He also sets up a prescriptive right to the half of the tithe. Under these circumstances, I think the plaintiff is entitled to inquire into the time for which he and his predecessors have been in possession. The interrogatories as to the churchyard rent seem to me to be admissible upon similar grounds.

POLLOCK, B. I am of the same opinion. These interrogatories do not seek to discover the mode in which the defendant will endeavour to establish his title. They inquire into the character of that title, and the quality of the defendant's possession of the churchyard rent and tithe rent-charge. If the words “by what authority” were to remain, the interrogatories might possibly be considered as infringing upon the rule that one party cannot have a discovery of his adversary's title. But with the suggested variation, to which the plaintiff has expressed his readiness to submit, I see no objection to them.

*Rule discharged.*

Attorneys for plaintiff: *Le Riche & Son.*

Attorneys for defendant: *Clarke, Son, & Rawlins.*

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Jan. 27.

MARTIN v. SMITH.

*Landlord and Tenant—Occupation under void Demise—Terms applicable to a yearly Tenancy.*

By an agreement not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff, a house and premises for seven years, upon the terms (amongst others) that the defendant would, in the last year of the term, paint, grain, and varnish the interior, and also whitewash and colour. The defendant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, &c., the interior, and whitewashing and colouring in the seventh year:—

*Held*, that the defendant must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year; and that he was therefore liable.

DECLARATION, that by an agreement of the 15th of February, 1866, the plaintiff agreed to let to the defendant, and the defendant agreed to take from the plaintiff, a dwelling-house and premises upon the following terms (amongst others), viz.: Term, seven years from Lady Day, 1866; rent, 50*l.*, payable quarterly; tenant to pay all rates and taxes (except property tax); also to maintain the said house and premises in repair, together with all drains, &c., and leave them in repair at the end of the term; also to paint two coats, and grain, and twice varnish the interior, in the last year of the term, with the best materials and workmanship, also whitewash and colour; that the defendant, pursuant to the said agreement, entered into and upon the said house and premises, and held and occupied the same as tenant from year to year thereof, subject to the aforesaid terms, or such of them as were applicable to the said tenancy, during the whole term or period of seven years aforesaid, which expired before action, viz., on March 25, 1873; and all conditions, &c.; yet the defendant did not, during the said tenancy, maintain the said house and premises in repair, together with all drains, &c.; nor did the defendant leave them in repair at the end of the said tenancy; and, secondly, the defendant did not paint two coats and grain and twice varnish the said interior in the last year of the tenancy with best materials and workmanship, nor did the defendant whitewash and colour as aforesaid.

Demurrer to the second breach and joinder.



*English Harrison*, in support of the demurrer. The agreement is in words of present demise, and, being for a longer term than three years, is void under 8 & 9 Vict. c. 106, s. 3; and the only obligation on the defendant was such as arose out of the tenancy from year to year which was created by his occupying and paying rent, applying to that tenancy such of the terms of the agreement as were applicable to a yearly tenancy. But this term is not so applicable, for it is not to be performed in each year of the tenancy, but only in the seventh year of a term which the parties intended to create, but which was in fact never created. On this ground *Beale v. Sanders* (1) may be distinguished.

*E. Clarke*, contra. The agreement, though void as a lease, was a good agreement, and might be enforced in equity: *Parker v. Taswell* (2); and its terms were adopted by the conduct of the parties, and applied to the tenancy which was in fact created, so far as they were not inconsistent with it. A term may be so inconsistent with a yearly tenancy as to be inapplicable; as, for instance, a term requiring a two years notice to be given: *Tooker v. Smith* (3); but there is no such inconsistency in the parties agreeing that, if the relation of landlord and tenant shall continue for the whole period contemplated, the tenant or the landlord will do certain acts or pay a sum of money: *Tress v. Savage* (4); *Digby v. Atkinson* (5); *Pistor v. Cater*. (6) The word "term" is not to be interpreted in a strict sense, but signifies the period of seven years during which the tenancy was to last: *Bowes v. Croll*. (7)

*E. Harrison*, in reply.

KELLY, C.B. I am of opinion that the plaintiff is entitled to judgment. An agreement has been entered into between the plaintiff and the defendant, with words of present demise, for a tenancy of certain premises for a term of seven years; the rent was to be payable and certain acts were to be done in each year, and in the last year of the term the tenant was to do certain

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(1) 3 Bing. N. C. 850.

(4) 4 E. &amp; B. 36; 23 L. J. (Q.B.)

(2) 2 De G. &amp; J. 559; 27 L. J. (Ch.) 339.

812.

(5) 4 Camp. 275.

(3) 1 H. &amp; N. 732.

(6) 9 M. &amp; W. 315.

(7) 6 E. &amp; B. 255.



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painting and colouring beyond the annual repairs. The agreement being void at law as a lease under 8 & 9 Vict. c. 106, s. 3, but the tenant having entered into possession and having occupied and enjoyed the premises during the whole period, the question is, what are the liabilities of the tenant under the agreement coupled with this occupation and enjoyment. It is now clearly settled that when a tenant enters under an agreement for a term which is void at law, he is liable as a tenant from year to year, on all the terms of the agreement applicable to a yearly tenancy. It may be suggested, indeed, that the agreement being void at law there was no consideration for such a promise as the plaintiff contends for; but *Parker v. Taswell* (1) has decided that such an agreement, though void as a lease, is good and valid as an agreement, and may be enforced in equity by a decree for specific performance. This agreement, then, being capable of being enforced, there was a good consideration for the promises of the parties. The question, then, is whether the term of the agreement that the tenant should paint during the last year of the term of seven years is applicable to a tenancy from year to year which has, in fact, continued during the whole of that period; and it appears to me that, although during that period the defendant was only tenant from year to year, and his tenancy might at any time have been determined by a half year's notice to quit, yet his occupying under the agreement amounted to a promise that, if he should continue to occupy for the entire term, he would perform what was by the agreement to be performed in the last year of that period. In *Tress v. Savage* (2) where there was an agreement in words of present demise, dated the 17th of December, for a tenancy to commence on the 25th of December, and the question was, whether the tenant was entitled to a half year's notice to quit at the end of the three years, the effect of the occupation under the agreement was held to be that the tenant "has not a lease nor a tenancy for three years and a week, but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then by the agreement of both parties he goes out without notice." I think

(1) 2 De G. & J. 559; 27 L. J. (Ch.) 812.      (2) 4 E. & B. 36; 23 L. J. (Q.B.) 339.

that case is not distinguishable in principle from the present, and our judgment must therefore be for the plaintiff.

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PIGOTT, B. I am of the same opinion. The agreement contemplated a term of years, and *Parker v. Taswell* (1) decides that such an agreement is void only as a lease, but that it is valid and may be acted on and enforced as an agreement. Therefore the defendant was not merely tenant from year to year during his occupation, but he had a right at any time to enforce specific performance of the agreement, and turn it into a lease. There is, therefore, nothing to prevent us from giving effect to the intention of the parties, by holding that the stipulation as to painting in the last year of the period of seven years, if he should remain tenant so long, was one of the terms under which the defendant occupied those premises.

CLEASBY, B. I am of the same opinion. Although the word "term" is used in the agreement, we are not bound to construe it in its technical sense, but as meaning space or period of time, as was done in *Bowes v. Croll* (2), where Crompton, J. says: "It is argued that they (the defendants) must occupy for a 'term' of five years, and that this means a term created by a lease. I think that is a narrow construction. We have the authority of the Court of Common Pleas, in *Wood v. Copper Miners Co.* (3), that in a similar case the words 'term of twelve years' and 'term aforesaid' do not mean the term to be created by the lease in the technical sense of the expression, but that the true meaning of the word 'term' there is 'period' or 'space of time.'" Those words are entirely applicable to the present case, and in deciding for the plaintiff we are giving effect to the obvious intention of the parties.

*Judgment for the plaintiff.*

Attorneys for plaintiff: *Harper, Broad & Battcock.*

Attorney for defendant: *Webb.*

(1) 2 De G. & J. 559; 27 L. J. (Ch.) 812.

(2) 6 E. & B. 255, at p. 265.

(3) 14 C. B. 428, at p. 467; 17 C. B. 561; 23 L. J. (C.P.) 209; 24 L. J. (C.P.) 34.

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Jan. 30.

## LORD v. PRICE.

*Trover—Action by Purchaser for Goods subject to Vendor's Lien for unpaid Purchase-money.*

The purchaser of goods which remain in the possession of the vendor subject to the vendor's lien for unpaid purchase-money cannot maintain an action of trover against a wrong-doer.

ACTION of trover tried in the Passage Court, Liverpool, on the 8th of November, 1873. The plaintiff, on the 15th of August, bought at an auction two lots of damaged cotton, part of the salvage from a fire, under conditions which, so far as is material, were as follows:—

“2. All the cotton, as allotted, is to be at purchaser's risk as to fire, theft, disarrangement of lots, or loss in any respect, from the falling of the broker's hammer, and to be taken away before Saturday next, the 16th instant, at four o'clock, p.m.; and if any should remain after that time, the cotton remaining will be sold, without notice, the deposit forfeited, and the loss (if any) to be made good by the defaulter.

“3. A deposit of 50*l.* per heap and 10*l.* per lot to be paid at the time of sale of each lot, and payment of the balance in cash, less 1½ per cent. discount, to be made immediately after at the broker's office, and before delivery of the cotton.”

The plaintiff paid the deposit on the two lots, but did not pay the residue of the purchase-money, and left the cotton in the field where the auction had been held.

On the same day he removed one of the lots; but on going on the 18th of August to fetch the other lot, he found that it was gone. It had, in fact been taken by the defendant, who was also a purchaser at the sale, by mistake for a lot which had been bought by him, and the plaintiff (whose purchase-money was still unpaid) now sued him for the alleged conversion.

The learned assessor, on the defendant's application, nonsuited the plaintiff, on the ground that the vendor's lien for unpaid purchase-money prevented him from maintaining an action of trover, and gave leave to the plaintiff to move the Court of Exchequer for a new trial. A rule having been obtained accordingly,

*Gully* shewed cause. In order to maintain this action the plaintiff must have the right to present possession. But the plaintiff has no such right. It is true that the property in the goods passed to him, but the vendor's lien for unpaid purchase-money deprived him of the right to possession, which the vendor retained: *Bloxam v. Sanders* (1); *Milgate v. Kebble*. (2) The owner, therefore, could have maintained an action against the defendant, and the plaintiff cannot, for it cannot be that both can sue. Similarly a mortgagee under a bill of sale of chattels, of which the mortgagor is to remain in possession until default in payment, cannot maintain trover for them: *Bradley v. Copley* (3); nor a landlord for chattels leased to a tenant: *Gordon v. Harper*. (4) The plaintiff's remedy is not in this form of action, but by a special action for injury to his interest in the goods, as in *Mears v. London and South Western Ry. Co.* (5) This course would secure the rights of all parties, but if the plaintiff can recover without paying for the goods, the vendor's lien will be lost. Possibly also, by now paying or tendering the price, the plaintiff might entitle himself to recover in trover. In any case he is not without remedy, for he may treat the vendor as his trustee, and, on giving an indemnity, sue in his name.

*Myburgh*, in support of the rule. It is true the plaintiff has no right to present possession as against the vendor, but the vendor's right is for his own benefit, and the defendant, who is merely a wrong-doer, cannot take advantage of it.

BRAMWELL, B. I am of opinion that this rule must be discharged, on the ground that the action cannot be maintained without a right of present possession in the plaintiff. Here there is no evidence that the plaintiff had any right of possession; that right was in the vendor, who was entitled to retain possession of the goods until the balance of the purchase-money was paid, and, on non-payment, to resell the goods and recoup himself for any loss sustained on the re-sale. Therefore, if the goods were tortiously removed (and there is no evidence that the vendor assented

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(1) 4 B. &amp; C. 941, at p. 948.

(2) 3 M. &amp; G. 100.

(3) 1 C. B. 685.

(4) 7 T. R. 9.

(5) 11 C. B. (N.S.) 850; 31 L. J. (C.P.) 220.

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to their removal) it is manifest that the vendor could have maintained an action. But it cannot be that two men can be entitled at the same time to maintain an action of trover for the same goods. It is, therefore, abundantly manifest that the vendor could, and that the plaintiff cannot, maintain this action.

Whether, by paying the balance of the price now, or tendering it, the buyer can, either in an action of trover or by a special action on the case, have any remedy at Common Law in his own name, or whether he is limited to an action in the name of the vendor, it is not necessary now to pronounce. It is sufficient to say that, on the facts shewn here, the plaintiff cannot recover.

AMPHLETT, B. I am of the same opinion. I should be sorry to suppose that the plaintiff could have no remedy. No doubt, on paying the balance he would be entitled to relief, either at law or in equity. But it is sufficient to say here that he has not done those acts which were necessary to entitle him to the possession of the goods, and that he cannot therefore maintain this action.

*Rule discharged.*

Attorneys for plaintiff: *Lowndes & Co., Liverpool.*

Attorney for defendant: *Lupton, Liverpool.*



## LANGTON v. CARLETON.

1873

Nov. 19.\*

*Master and Servant—Service for “Twelve Months certain”—Notice—Continuance of Service beyond the Twelve Mont’ls.*

The defendant agreed to serve the plaintiff as a traveller and agent “for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months’ notice” :—

*Held* (by Bramwell and Pigott, BB., Kelly, C.B., dissenting), that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three months’ notice only applied in case the engagement was prolonged beyond the twelve months.

## SPECIAL CASE.

By an agreement dated the 23rd of January, 1871, between the plaintiff and his partner H. P. Burrows (since deceased), of the one part, and the defendant of the other part, it was agreed (among other things), first, that the defendant should faithfully serve the plaintiff and Burrows, so long as the agreement was in force, by travelling and obtaining orders for ale, &c., and receiving and collecting moneys due to them in and about London, and otherwise acting for them as agent and traveller; secondly, that the defendant would not during the continuance of the agreement take orders for ale, &c., for any other firm, and that for his services the plaintiff and Burrows should pay the defendant 200*l.* a year and a 10 per cent. commission; and thirdly, that the agreement should be “for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months’ notice in writing of his desire so to do;” and that if the plaintiff and Burrows should desire to terminate the agreement without notice, after twelve months and before any notice should have expired, they might do so upon paying the defendant 50*l.*

The defendant entered the service upon these terms, and acted during the year 1871. On the 7th of December, 1871, he received from the plaintiff and Burrows a notice that they should not require his services after the 23rd of January, 1872. On the 5th of February the plaintiff (Burrows being then deceased), commenced this action for a debt of 91*l.* 18*s.* 7*d.*, alleged to be due

\* Decided in Michaelmas Term, 1873.

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from the defendant to the plaintiff under the above agreement. The defendant, who did not dispute the debt, pleaded a set off of 50*l.*, which he insisted was due to him as liquidated damages in lieu of a regular notice to quit the plaintiff's service.

The question for the opinion of the Court was whether the defendant was entitled to this set off.

*Holl*, for the plaintiff. The agreement is for twelve months "certain," and either party could put an end to it at the end of the twelve months, without notice: *Thompson v. Maberly* (1); *Brown v. Symons*. (2) The parties may have contemplated the engagement continuing; but unless it was continued, no notice was necessary. The plaintiff gave a notice, but that was superfluous. The claim for liquidated damages, therefore, cannot be sustained.

*Jelf* (*Bulley* with him), *contra*. The servant here was entitled to a three months' notice. If the service had lasted as both parties originally contemplated, beyond the twelve months, such a notice would have been necessary, and it is not reasonable to suppose that either party could withdraw at the end of the twelve months, abruptly and without any notice whatever. The service was to be for twelve months "certain," and therefore could not be terminated within that period by any notice. Nor, upon the fair construction of it, could it be terminated at the end of the twelve months without a three months' notice. The words "after which time," should be construed as "after, or at the expiration of which time." The defendant is therefore entitled to the set off which he claims.

*Holl*, in reply.

KELLY, C.B. I think the defendant is entitled to our judgment. He was dismissed at the expiration of the first twelve months of his engagement without a three months' notice, and that being so, he is entitled, in my opinion, to set off 50*l.* under the language of the agreement. It is contended that the true construction of the agreement is, that it was an engagement for twelve months certain, at the expiration of which either party might determine it without

(1) 2 Camp. 573.

(2) 8 C. B. (N.S.) 208; 29 L. J. (C.P.) 251.

notice at all. But that does not commend itself to me as a correct or reasonable contention. The agreement contemplates, I think, a continuance of the service beyond the twelve months. Within that time it could not be terminated by notice at all, nor, as it seems to me, at the close of that period, without a three months' notice.

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BRAMWELL, B. I entertain a view differing from that just expressed by my Lord. The agreement is difficult to construe, but it must, I think, mean one of two things: either an agreement for twelve months certain, to expire without notice at all at the end of the twelve months, and then to continue, if the parties so please, until terminated by a three months' notice; or it is an agreement for twelve months, and for some time after, until determined by a three months' notice. This would, in fact, make it an agreement for fifteen months at the least. I prefer the first construction, for otherwise I do not see that any meaning is given to the words "twelve months certain." In my opinion, therefore, notwithstanding the ingenious argument of Mr. Jelf, the plaintiff is entitled to the judgment of the Court. There was no necessity to give any notice within the twelve months. The clause as to notice only applies in case the parties do in point of fact prolong the engagement.

PIGOTT, B. I concur with my Brother Bramwell in this case. This is a special contract, and not an ordinary yearly hiring for twelve months certain, and then from year to year, until determined by notice. The parties no doubt contemplated an engagement which might last longer than one year, and if it did, then it was to be terminated by a three months' notice. But the necessity for a notice only arises in case the first year has expired. At the end of that year, either party could, in my opinion, put an end to the agreement without any notice at all. My judgment, accordingly, is for the plaintiff.

*Judgment for the plaintiff.*

Attorneys for plaintiff: *Dod & Longstaffe.*

Attorneys for defendant: *Buckley, Millard, & Cayley.*

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Feb. 7.

[IN THE EXCHEQUER CHAMBER.]

MARCHANT *v.* THE LEE CONSERVANCY BOARD.

*Pension to Public Servant—Power to vary Pension—Lee River Navigation Improvement Act (13 & 14 Vict. c. cix.).*

By the Lee River Navigation Improvement Act, 1850, s. 76, it is enacted that “it shall be lawful for the trustees from time to time to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case may, in the judgment of the trustees, be reasonable and proper,” and to pay the same out of moneys in their hands by virtue of their special Acts: Under this section the trustees, by resolution not under seal, granted to their clerk upon his resignation of his office, an annuity of 300*l.* a year:—

*Held* (reversing the decision of the Court below), that the trustees were entitled afterwards to reduce the amount of the annuity.

ERROR from the judgment of the Court of Exchequer, in favour of the plaintiff, upon a special case; reported, Law Reports, 8 Ex. 290, where the facts are fully stated.

The question raised by the case was, whether the defendants, who had, under the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), succeeded to the rights and obligations of the Trustees of the Lee Navigation, had power to reduce from 300*l.* to 150*l.* an annuity granted by the trustees in 1865, by resolution not under seal, to the plaintiff, their clerk, upon his resigning his office.

The plaintiff had been appointed to his office in 1825, under 7 Geo. 3, c. 51, s. 76, by which the officers appointed by the trustees “shall be from time to time removeable at the will and pleasure of the said trustees or any seven or more of them.” There was no power under that Act of granting a pension, the funds of the trustees being by s. 84 applicable to certain defined purposes (not including such a grant) “and to no other use or purpose whatsoever;” but by 13 & 14 Vict. c. cix., s. 76 (set out in the head-note), the trustees were authorized to grant annuities to retiring servants. The annuity which was granted to the plaintiff under this section in 1865 was, by a resolution of the defendants, passed on the 16th of February, 1872, reduced to 150*l.* in consequence of a falling off in the funds.



Upon a special case, stated in an action brought to recover the difference between the quarter's allowance paid to the plaintiff under the second resolution and the amount which he would have received under the first, the court below gave judgment for the plaintiff; and the defendants brought error.

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*J. Brown, Q.C.* (*Barnard* with him), for the defendants. There is nothing in the resolution of the 11th of March, 1865, to prevent the trustees from reconsidering the matter. Under the earlier statute, 7 Geo. 3, c. 51, they could not have granted a pension, the funds being appropriated by s. 84 to defined purposes, of which this was not one. The later Act, 13 & 14 Vict. c. cix. s. 76, only conferred on them a power; it imposed no obligation to grant a retiring pension to the plaintiff, or even to entertain his application; what they did was a mere bounty, which they were at liberty to discontinue altogether, or to vary at discretion. The words of 13 & 14 Vict. c. cix. s. 76, "from time to time," indicate that their power is not exhausted. Neither was there any bargain; nor, if there had been one, was there any consideration to support it. By 7 Geo. 3, c. 51, s. 76, under which the plaintiff was appointed, he was removeable at the will and pleasure of the trustees; the pension, therefore, could not have been granted in consideration of his resigning. It is doubtful whether the trustees, who were a public body, could have bound their successors even by a grant of a pension under seal; but it is unnecessary to contend for that proposition.

*Benjamin, Q.C.* (*Hayman* with him), for the plaintiff. The application of the plaintiff was not an application to the mere bounty of the trustees, it was a claim of right that they should perform the duty imposed on them by the 13 & 14 Vict. c. cix. s. 76, of considering and determining on the question whether they should grant a pension, and what the amount of it should be. The case of misconduct being specially excepted in the section, there is ground to contend that the trustees were bound to grant a pension in any other case; but at least they were bound then to consider and to exercise their judgment as to what they would do; and having then exercised their judgment, their determination was final, and could not be afterwards altered even by themselves, still



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less by their successors, who were incompetent to judge of the reasons which governed their decision. This is therefore an irrevocable grant under the statute. But further, the plaintiff must be considered, after the passing of 13 & 14 Vict. c. cix., to have continued in the service of the trustees on the terms that, if he should resign without misconduct the trustees would pay him such sum, whether by way of annuity or otherwise, as they, in the fair exercise of their judgment, should determine. Therefore when, in consideration of his past services performed at their request, and of his resignation, the trustees resolved to pay him the pension in question, a binding contract on them to pay it was created. [He referred to s. 56 of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16, incorporated by 13 & 14 Vict. c. cix. s. 7), and to *Eastwood v. Kenyon* (1) and *Gibson v. East India Co.* (2)]

*J. Brown, Q.C.*, in reply.

KEATING, J. I am of opinion that the judgment of the Court below in favour of the plaintiff (in which the Lord Chief Baron seems to have concurred with some hesitation) must be reversed. By the Act which originally constituted the corporation of the trustees of the river Lee, and under which the plaintiff was appointed to his office (7 Geo. 3, c. 51) it would not have been competent to the trustees to make him any retiring allowance or payment upon his leaving their service, because by s. 84 of that Act, all sums raised by the trustees were appropriated to certain defined purposes, of which this was not one. But by 13 & 14 Vict. c. cix. s. 76, power was given to them to "pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case may, in the judgment of the trustees, be reasonable and proper," which annuity or allowance they were authorized to pay out of the moneys coming to their hands under their special Acts. In 1865, the plaintiff having been clerk to the trustees for forty years, and being from age and ill health unable any longer to perform his duties, he applied to the trustees to

(1) 11 A. & E. 428.

(2) 5 Bing. N. C. 262.

appoint his son in his place, and solicited their favourable consideration of his past services. The trustees acceded to these requests, and passed a resolution "that his resignation be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life." The plaintiff received the pension for several years, until, the funds falling off, it became necessary, in the judgment of the defendants, who had in the meantime succeeded to the powers and obligations of the trustees, to reconsider the amount, and they accordingly varied the resolution by reducing the pension to 150*l.* per annum. The question is, whether they had power to vary the previous resolution, and I think they clearly had that power. It is unnecessary to consider what would have been the case if the trustees had made a grant of an annuity under seal, or by a valid contract founded on a good consideration; there was here neither the one nor the other. It is argued indeed that the resolution was binding as a grant, because the 76th section of 13 & 14 Vict. c. cix. imposed an obligation on the trustees to exercise their judgment, and that having once exercised that judgment, it could not be subsequently varied; but from that construction of the section I entirely dissent; it conferred a power upon them, but it imposed no obligation. It is also argued that the resolution evidenced a contract founded on good consideration between the plaintiff and the defendants; but I can find no evidence of any such contract. The resolution conferred a mere bounty on the plaintiff; the elements of a contract are entirely wanting. The trustees no doubt intended that the plaintiff should be provided for during the remainder of his life, not anticipating a deficiency in the funds, but there was nothing to deprive them of the power of reconsidering their resolution.

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GROVE, QUAIN, ARCHIBALD, and HONYMAN, JJ., concurred.

*Judgment reversed.*

Attorneys for plaintiff: *Taylor & Arnold.*

Attorney for defendant: *R. J. Pead.*

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Feb. 11.

## [IN THE EXCHEQUER CHAMBER.]

SMITH v. FLETCHER AND OTHERS.

*Trespass—Duty of Landowner—Collecting Water—Mining.*

The defendants' mines adjoined and communicated with the plaintiffs'; and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land there ran a watercourse, which, in the year 1865, was diverted by them into another channel. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks passed into the defendants', and so into the plaintiffs' mines. If the land had been in its natural condition the water would have spread itself over the surface and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines.

At the trial of an action brought by the plaintiff to recover the damage he had sustained, the learned judge directed a verdict for the plaintiff, holding that the case was governed by *Fletcher v. Rylands* (Law Rep. 3 H. L. 330) and that the defendants were absolutely liable; and rejecting evidence offered by the defendants that every reasonable precaution had been taken to guard against ordinary emergencies:—

*Held* (reversing the judgment of the Court below), that the case was not beyond all question governed by *Fletcher v. Rylands* (Law Rep. 3 H. L. 330), that the water coming from the natural overflow and that coming from the diversion of the watercourse might possibly admit of different considerations; that if the evidence tendered had been received, there might have been questions for the jury, and that under all the circumstances there ought to be a new trial.

The opinion of the jury at such trial ought to be taken as to whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine.

APPEAL by the defendants from a decision of the Court of Exchequer discharging a rule to enter a nonsuit, or for a new trial. The pleadings and facts are fully stated in the report in the Court below. (1)

*Holker, Q.C.* (*Kay, Q.C.*, and *Baylis* with him), for the appealing defendants. The defendants are not responsible. They did not make the openings and cuts on their land in order to store water,

(1) Law Rep. 7 Ex. 305.

and this renders the case of *Fletcher v. Rylands* (1) inapplicable. There the defendant made a reservoir to store water. Here the openings and cuts were made in the ordinary course of working the mine. There is no suggestion either of negligence on the defendants' part or of any abnormal mode of working. The water which did the mischief came during a heavy flood by gravitation. *Smith v. Kenrick* (2) is in point. The mischief in that case, as here, was caused by the ordinary process of working the mine, and although damage resulted to the plaintiff, it was held that the defendant was not responsible. In *Baird v. Williamson* (3) the distinction is drawn between water flowing by gravitation from one mine to another, and water sent by the active interference of the mine-owner. In respect of the latter he would be responsible.

[LORD COLERIDGE, C.J. The question before us seems really to be one of fact. Did this water come simply by natural causes into the plaintiff's mines? If so, *Smith v. Kenrick* (2) would be applicable. Or, on the other hand, did the defendants, as the Court below seem to have thought, cause the water to come there? If they did, the ruling of the Court of Common Pleas in *Baird v. Williamson* (3), as to the water pumped to a high level, would apply.]

The proper inference to be drawn is, that the defendants did nothing actively to bring the water.

[LORD COLERIDGE, C.J. They made a "cut" from the bottom of one of the hollows, and also altered the channel of a water-course.]

The watercourse was really improved and enlarged, and the defendants desired to give evidence of this, and also that they had taken all reasonable precautions to prevent damage. But the learned judge rejected evidence on both points, conceiving that *Fletcher v. Rylands* (1) governed the case. As to the "cut," that was analogous to the passage or "crut" made by the defendant in *Baird v. Williamson* (3) from one seam to another, and which it was held he was justified in making in the usual course of working. The working therefore being usual, and there being no negligence, the defendants were not liable for the consequences of an

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(1) Law Rep. 3 H. L. 330; 18 L. J. (C. P.) 172.

(2) 7 C. B. 515.

(3) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.



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extraordinary flood: *Carstairs v. Taylor* (1); *Tennent v. Earl of Glasgow*. (2)

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*Herschell, Q.C.* (*Crompton* with him), for the plaintiff. The natural consequence of the defendants' act was to bring the water into the openings and hollows in their land, whence it flowed through the cut into the plaintiff's mines. It is true that the openings were not made on purpose to store water, but that cannot make any difference; the result is the same. *Smith v. Kenrick* (3) only decides that if subterranean water, collected in underground workings in the ordinary course of mining, escaped without the mine-owner's negligence, he would not be liable. But what may be called "mine water" proper is subject to different considerations from water collected on the surface of the land by quarrying.

[LORD COLERIDGE, C.J. We must take it that the defendants' workings, both underground and on the surface, were ordinary and usual.]

At all events they create a state of things on the surface, of which the necessary consequence is, that water will accumulate. The principle of *Fletcher v. Rylands* (4) therefore applies, and it was not necessary to prove any actual negligence. The defendants choose to collect what to their knowledge may do damage in certain circumstances, and if damage is done they are absolutely responsible: *Ruck v. Williams*. (5) *Baird v. Williamson* (6), so far as the third class of water is concerned, viz. the water raised by pumping, is in the plaintiff's favour. The defendants here, by making the cut and diverting the stream, did actually cause the water to flow into the plaintiff's mine, and it is no answer to say that if the stream had not been diverted more water would have overflowed.

*Holker, Q.C.*, was not called on to reply.

LORD COLERIDGE, C.J. We concur with the Court below that it is impossible to enter a nonsuit, but we are further of opinion

(1) Law Rep. 6 Ex. 217.

(4) Law Rep. 3 H. L. 330.

(2) Court of Session Cases, 3rd Series, 133.

(5) 3 H. & N. 308; 27 L. J. (Ex.) 357.

(3) 7 C. B. 515; 18 L. J. (C.P.) 172.

(6) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.



that there ought to be a new trial. The case appears to us to have been stopped too soon. The learned judge seems to have been of opinion that the case was one in all respects within *Fletcher v. Rylands*. (1) We do not think that it was, in every respect or in every conceivable aspect, within that authority; and if evidence had been given on behalf of the defendants, we think there might have been questions for the consideration of the jury.

Again, the learned judge drew no distinction between the water which came from the new diversion of the stream and that which came from the natural overflow. We think that what may be called these two sets of water may admit of very different considerations.

As there is to be a new trial it is unnecessary to say more, except that we think it desirable that the opinion of the jury should be taken, as to whether what was done by the defendants was done in the ordinary, reasonable, and proper mode of working the mine.

KEATING, QUAIN, GROVE, ARCHIBALD, and HONYMAN, JJ., concurred.

*Judgment reversed.*

Attorneys for plaintiff: *Helder & Kirkbank.*

Attorneys for defendants: *Gregory, Rowcliffes, & Co., for Musgrave, Whitehaven.*

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WHAITE v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

*Feb. 12.*

*Carrier—Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), ss. 1, 2—"Parcel or Package."*

The plaintiff sent upon a truck by the defendants' line a waggon with wooden sides, but without a top, in which he packed, amongst other things, paintings exceeding the value of 10*l.*, which were so placed in the waggon that it could be seen that they were paintings, but their exact character could not be seen. In an action for injury to the paintings:—

*Held*, that the waggon, with its contents, was a "parcel or package" within the Carriers Act, s. 1, and that, the goods not having been declared, the plaintiff could not recover.

ACTION brought against the defendants to recover the value of goods of the plaintiff injured and destroyed whilst being carried

(1) Law Rep. 3 H. L. 330.

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by the defendants for the plaintiff. The defendants paid 31*l.* into court in respect of some of the goods, and as to the rest pleaded that the goods were within 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, and were contained in a parcel or package exceeding the value of 10*l.*, and were not declared.

The cause was tried before Pollock, B., at Manchester, on the 23rd of December, 1873, and the facts proved were as follows:—The plaintiff, who was a decorator and exhibitor of fancy articles at Manchester, had sent to Wigan various articles, including decorations, models, mechanical figures, and oil paintings, for exhibition at the Wigan Infirmary Bazaar. On the closing of the exhibition these articles were packed in a waggon and a lorry for return. The oil paintings, which were ten in number, were placed in the waggon, the two middle ones being placed, with their faces inward, against the opposite sides of a frame shaped like an inverted V, and the remainder ranged in line behind the two first, and separated from each other and kept in place by strips of wood nailed to the floor. The waggon was open at the top, so that it could be seen that that there were pictures inside, but the character of the pictures could not be seen. The plaintiff and his foreman, in their evidence, described themselves as having “packed” the things in the waggon in this manner. The waggon and lorry were placed on two trucks on the defendants’ line for conveyance to Manchester; the train in which they were met with a collision, and the contents of the waggon were greatly injured, the paintings in question, which were proved to be worth 100*l.*, being wholly destroyed. The plaintiffs paid a sum of 31*l.* into court in respect of the other goods; a further sum of 20*l.* for consequential damage in respect of them was agreed on at the trial; and a verdict was entered for the plaintiff for 120*l.*, with leave for the defendant to move to reduce the verdict to 20*l.*, on the ground that as to the paintings the defendants were protected from liability by the Carriers Act (1), no declaration having been made or insurance paid.

(1) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, provides that no “common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following, that is to say” (amongst

other things), paintings “contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger . . . when the value of such article or articles or property aforesaid

A rule having been obtained accordingly,

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*Holker, Q.C.* (*Ambrose* with him), shewed cause, and contended that a waggon could not properly be described as either a parcel or a package; it was not sufficiently closed up, and it was of too large a size. The defendants were able to see what was inside, and so, without any declaration, had warning of its contents. The object of the statute was therefore secured, which was to protect carriers against incurring liabilities the extent of which they had no means of knowing.

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*R. G. Williams, Q.C.* (*Herschell, Q.C.*, with him), in support of the rule, contended that the pictures were described as packed, and were, in fact, packed in the waggon, and that anything packed was a package; that nothing could turn upon the size of the package, but that in fact the two words "parcel" and "package" appeared to be designedly used, the one to describe the smaller, the other to describe the larger kinds of packages, so that everything might be included; and that it was no answer that the goods, though practically covered up, were partially visible. The sender has to declare, and the carrier is entitled to know, not only the nature, but the value of the goods.

BRAMWELL, B. I think this waggon with its contents was a "package" within the meaning of the Act. Although one would not commonly describe it in that way, yet, looking at the object and purpose of the Act, I think we are not only entitled, but compelled to say that it was a "package or parcel" within the section. It is to be observed that the plaintiff himself and his foreman authorize us in so describing it, for they say they "packed" the goods in the waggon, and no one would doubt that this expression was

contained in such parcel or package shall exceed the sum of 10%," unless at the time of delivery "the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as is hereinafter mentioned, or an engagement to pay the same, be accepted by

the person receiving such parcel or package"; and by s. 2, "when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed 10%," the carrier may demand an increased rate of charge, to be notified as therein mentioned.

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rightly used ; but if so, then the waggon so packed with goods was a package. Further, the packed waggon had this quality of a package about it, that the pictures were so packed by the plaintiff that, though the defendants could see that there were pictures in the waggon, they could not see what was the exact character of the pictures, which the plaintiff's mode of packing concealed. The rule must, therefore, be made absolute to reduce the verdict to 20%.

CLEASBY, B. I am of the same opinion. It is tolerably plain that, if the plaintiff had declared the nature and value of the contents of the waggon, the defendants would have been entitled to charge an increased rate of freight under s. 2 of the Act ; but this they could not do unless the waggon were a "parcel or package." If so, the plaintiff, not having declared, is prevented by s. 1 from recovering. It would be absurd to say that the waggon was too large to be a package ; plainly, size cannot be a criterion.

POLLOCK, B. I am of the same opinion. The Act uses the words "parcel" and "package." Both words being used, this gives us some assistance in arriving at the meaning of what each signifies. I think that this was a package, if not a parcel. The plaintiff says, "I packed the goods in my four-wheeled waggon, which had wooden sides, but no top," which is much as if a man should say, "I packed my silver forks in a wooden box, but I could not put a top on it, because it was too full." This was clearly a parcel or package within the meaning of the Act ; and the plaintiff, not having declared the value and nature of the contents, cannot recover.

*Rule absolute.*

Attorneys for plaintiff: *Edwards, Layton, & Jaques.*

Attorneys for defendants: *Clarke & Woodcock.*



RADLEY v. THE LONDON AND NORTH WESTERN RAILWAY  
COMPANY.

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Feb. 7.

*Contributory Negligence—Railway Bridge.*

The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' trucks from their line, the plaintiffs removing them thence as they thought fit. The defendants brought on to the plaintiffs' siding and left there, after working hours, trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs, and pushed the loaded truck up to the bridge, by which means the train of trucks was arrested. The defendants' servants, not being aware of the cause of the obstruction, pushed the train of trucks forward with so much force that the loaded truck knocked down the bridge. In an action for the damage so done, the jury having found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck :—

*Held*, that there was no evidence of contributory negligence to go to the jury.

THIS was an action brought to recover damages from the defendants for injury done to a bridge upon the plaintiffs' siding, under circumstances which are fully stated in the judgment. The cause was tried before Brett, J., at the Liverpool Summer Assizes, 1873. The defendants contended that the evidence shewed contributory negligence in the plaintiffs, and this question being left to the jury by the learned judge, they found for the defendants. A rule having been obtained for a new trial on the ground that the learned judge misdirected the jury in telling them that there was evidence of contributory negligence in the plaintiffs,

Jan. 30. *Aspinall, Q.C.*, and *McConnell*, shewed cause.

*Herschell, Q.C.*, and *Baylis*, supported the rule, and referred to *Davies v. Mann* (1) and *Dimes v. Petley*. (2)

The arguments are fully noticed in the judgment delivered.

*Cur. adv. vult.*

Feb. 7. The judgment of the Court (Bramwell and Amphlett, BB.) was delivered by

(1) 10 M. & W. 546.

(2) 15 Q. B. 276; 19 L. J. (Q.B.) 449.



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BRAMWELL, B. This is a case of very great complexity, not so much in the facts as in the considerations to which they give rise. So much so that we have thought it desirable to put our opinion in writing. The material facts are as follows:—The plaintiffs are colliery owners, who have sidings out of and on one of the defendants' lines; over these sidings is a bridge belonging to the plaintiffs, with a headway of eight feet. It has been the course of business between the plaintiffs and the defendants for the defendants to take from these sidings the plaintiffs' waggons loaded with coals and deliver or leave them at their destination; also to collect the plaintiffs' waggons when empty, and bring them to the sidings, and there leave them. When the waggons were so left on the sidings, the plaintiffs dealt with them as they thought fit, i. e. took them to the pit to be loaded in such order and at such times as they pleased, or took them to their workshops if they needed repair. On a certain Saturday, after working hours, when the men were gone and the plaintiffs could only move them as they might on a Sunday, i. e. by some special engagement of workmen, the defendants brought and left on one of the plaintiffs' sidings some empty waggons of the plaintiffs, and a waggon, empty except that it had on it a waggon of the plaintiffs which had broken down and could not travel, and had to be brought in this way to the plaintiffs. The waggon so loaded was, with its load, eleven feet high, and therefore could not pass under the bridge. It remained where so left. On the next Sunday night, after dark, the defendants brought in a very long train of the plaintiffs' empty waggons, and pushed it on the siding where this waggon, loaded with the disabled waggon, was. The waggon was pushed as far as the bridge. Had it been empty it would have passed underneath, and probably the defendants had often pushed waggons in this way under the bridge, though there was evidence to shew that they had been requested not to push things on the siding beyond a public highway, which was some distance before getting to the bridge in the direction in which the defendants brought the train of empty waggons. This is, perhaps, of no moment. But the waggon so loaded coming to the bridge and being unable to pass underneath it, the train stopped, and those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an

extent that the waggon with its load knocked the bridge down. For this the action was brought.

It is needless to say there was evidence of negligence in the defendants, but the learned judge left it to the jury to say whether, and the jury did say that, there was contributory negligence in the plaintiffs, and found their verdict for the defendants on that ground. We have to say whether the learned judge was right in the way in which he dealt with this question of contributory negligence.

The plaintiffs contended, first, that there was no evidence of contributory negligence. The way the defendants put it was as follows: They said the plaintiffs knew, or ought to have known, that the loaded waggon had been brought and left at the place where it was so left; they knew it would not pass under the bridge; they knew that the defendants would, or might, bring empty waggons on the Sunday, and, to make room for what they brought, would, or might, push forward whatever they found on the siding, as they had done before; that therefore the plaintiffs ought to have moved the loaded waggon, or taken out the broken one, or warned the defendants it was there. The plaintiffs said, in answer to this, that, assuming they knew the waggon was there with the load, so did the defendants; that the defendants knew also the height of the bridge, and that the waggon with its load would not pass under it; that the defendants knew that working hours were over when they brought it, and that practically the plaintiffs could not move or unload it till Monday; and they said they had a right to suppose that the defendants would not be so negligent, under these circumstances, as to drive this loaded waggon at the bridge, under which it could not pass, and which it would knock down if pushed against it with sufficient force, the more especially as there was another unoccupied siding on which the empty waggons brought on the Sunday might have been put; that in truth the alleged negligence in the plaintiffs was, not foreseeing and guarding against the negligence of the defendants; that even if they themselves had placed the loaded waggon there, they had no right to anticipate that the defendants would be so negligent as to put any waggon on the siding without seeing what was there, and to push with such force as they did when they found an obstruction.

We think this reasoning correct, and, consequently, that there

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was no evidence of contributory negligence for the jury. Suppose the defendants had brought the loaded waggon on Sunday night, and pushed as they did, then there would clearly have been no contributory negligence; but how does that differ from the present case, unless it is supposed there was some duty in the plaintiffs to move the loaded waggon on the Saturday, or to give some notice?

The plaintiffs further contended, what perhaps is much the same thing differently put, that, according to *Davies v. Mann* (1), assuming there was negligence on their part, yet, if the defendants could have avoided doing the mischief by reasonable care, they were bound to do so; and the plaintiffs objected to the learned judge's summing-up, that this had not been left to the jury. This also seems well founded. There must, therefore, be a new trial.

Should the case be tried again, it might be as well to leave the question in this way to the jury, giving leave to the plaintiffs to move on the ground that there was no evidence of contributory negligence, should the jury find for the defendants.

*Rule absolute.*

Attorneys for plaintiffs: *Sharpe, Parker, & Pritchard, for Peace, Wigan.*

Attorney for defendants: *Blenkinsop.*

Feb. 5.

BLANCHET v. POWELL'S LLANTIVIT COLLIERIES COMPANY,  
LIMITED.

*Action for Freight—Difference between Weight of Cargo shipped and Weight expressed in Bill of Lading—Estoppel—Foreign Bill of Lading—Contract made in France—Bills of Lading Act (18 & 19 Vict. c. 111), s. 3.*

To an action for a lump sum for freight by the master of a ship against the indorsee of a bill of lading the defendants pleaded, except as to 217 tons of cargo, that by the bill of lading the plaintiff acknowledged himself to have received a number of tons exceeding 217 tons, and that he did not carry or deliver the goods in the bill of lading mentioned, but only a portion, to wit, 217 tons (not alleging in terms that he did not carry all the goods delivered). The plaintiff replied (3.) that he carried all the goods delivered to him under the bill of lading, and that the goods so delivered and described in the bill of lading as weighing more than

(1) 10 M. & W. 546.

217 tons in fact weighed 217 tons only, and that the weight mentioned in the bill of lading was a mere misdescription, inserted without fraud or default; (4.) that the bill of lading was made in France, and that, according to the law of France, the whole freight was payable, although part only of the goods was carried and delivered; and (5.) repeating the allegations of the third replication, and adding that the bill of lading was made in France, and that, according to the law of France, the whole freight was payable. On cross demurrers:—

*Held*, that the plea was ambiguous, but that, assuming it to be good, the third replication was a good answer to it, for that, in an action for freight, the master is at liberty (notwithstanding 18 & 19 Vict. c. 111, s. 3) to shew that the cargo actually received by him differs in weight from that signed for in the bill of lading, at all events where the weight mentioned in the bill of lading is mere matter of measurement; and that the freight being a lump sum the plaintiff was entitled to recover the whole.

*Held* also, that the fourth and fifth replications were good.

DECLARATION that one Paraque, at L'Orient, in the republic of France, delivered to the plaintiff a cargo of pit-wood, to be carried by the plaintiff in a ship from L'Orient to Cardiff, under a bill of lading dated the 2nd of January, 1874, signed for the same by the plaintiff, and there delivered (accidents and dangers of the sea excepted) to the holder of the bill of lading or his order, he or his assigns paying the plaintiff for freight the sum of 3441 shillings and 4*l.* gratuity, amounting together to 176*l.* 1*s.*; that at the date of the bill of lading Paraque indorsed it to the defendants, in order to pass the property to them, and thereupon the property passed to them, and all conditions, &c., were fulfilled necessary to entitle the plaintiff to claim the freight and gratuity from the defendants, yet they made default in paying the same.

Plea, except as to so much as relates to the carrying and delivery of 217 tons of pit-wood, being parcel of the cargo on the declaration mentioned, that the bill of lading was in the words and figures following [here was set forth the bill of lading in the French language], which said bill of lading is properly translated thus:—"I, Blanchet, master of the ship *Christopher Columbus*, being at L'Orient, in order to go to Cardiff, acknowledge to have received on board my ship, of you, Paraque, 256,782 kilos., the whole safe and in good condition, marked and numbered as in margin [256,782], which I bind myself to convey (perils excepted) to Cardiff, and deliver to the bearer or his order on his paying me 3441 shillings and 4*l.* gratuity, in faith of which, &c. Signed at L'Orient, the 2nd of January, 1873.—A. E. Blanchet"; and

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that the plaintiff did not carry or deliver the goods in the bill of lading mentioned, but a portion of the same only, to wit, 217 tons.

Replications. 3. That the plaintiff did carry and deliver to the defendants the whole of the goods delivered to him under the bill of lading, and which were intended to be thereby described; and that the goods so delivered and described as weighing 256,782 kilos., a weight exceeding 217 tons, in fact weighed 217 tons, and no more, and that the weight mentioned in the bill of lading was a mere misdescription, inserted without fraud or default on the plaintiff's part.

4. That the bill of lading was made at L'Orient, in the republic of France, and that, according to the law of France, the whole freight was payable, although part only of the goods was carried and delivered as in the first plea mentioned.

5. Repeating the allegations in the third replication, and adding that the bill of lading was made at L'Orient, in the republic of France, and that, according to the law of France, the whole of the freight was payable.

Demurrers to the plea, and replications, and joinders in demurrer.

*R. E. Webster* in support of the demurrer to the plea and of the replications. A lump sum is payable for freight, and the remedy, if any, for short delivery is by cross action. The freight is not apportionable: *Robinson v. Knights*. (1) The plea, therefore, is bad.

[He was stopped.]

*E. Clarke*, contra. It has never been decided that lump freight in a bill of lading is not apportionable; but if it is not, the plea is a good answer to the whole action, for the whole cargo was not carried. If it is, it is an answer as to the part of the cargo not carried: *The Norway* (2); *Ritchie v. Atkinson*. (3) As to the replications, the third is bad, for it does not shew that the misdescription was caused by the fraud of the shipper, or the defendants, or some person through whom they claim; and in the absence of

(1) Law Rep. 8 C. P. 465.

(2) Br. & Lush. 377.

(3) 10 East, 295.



such fraud the bill of lading is conclusive, under the 18 & 19 Vict. c. 111, s. 3 (1), to shew the actual quantity or weight of the goods shipped. The fourth and fifth replications are also bad. The law of France is not applicable to a contract to be performed in England.

*Webster* was not called on to reply.

BRAMWELL, B. I think the plaintiff is entitled to our judgment. The plea is ambiguous, but the third replication states in positive terms that the plaintiff delivered to the defendants all the goods he actually received on board. It is said this is no answer, because the plaintiff is estopped, under the Bills of Lading Act (18 & 19 Vict. c. 111), s. 3, from denying that he received any other quantity than that mentioned in the bill. Now, I agree that in some cases, and for some purposes, where the weight of the cargo is material, the master might be bound by the statement of weight in the bill of lading. For example, in an action against him for non-delivery, he might be estopped, but not in such an action as this. The freight here is a lump sum, and, in my opinion, indivisible; and therefore, if there were anything in the point made for the defendants, they would escape paying any freight at all. Again, the owner might maintain this action, and there would clearly be no estoppel against him. The third replication is therefore good.

Further, the fourth replication seems to me to be clearly good. The statute transfers the contract as it existed between the original parties, and this contract was made in France, and the rights and obligations of the parties must be governed by French law. And the fifth replication is even better than the fourth, for it repeats the allegations of the third, and adds that the bill

(1) By the 18 & 19 Vict. c. 111, s. 3, it is enacted that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless the holder of the bill

of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

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of lading was made in France, and that by French law the whole freight was payable.

PIGOTT, B. I agree with what has fallen from my Brother Bramwell as to the effect of the Bills of Lading Act, and think that our judgment should be for the plaintiff upon this record.

CLEASBY, B. I am of the same opinion. The plea is ambiguous, but the effect of it is that the quantity stated in the bill of lading to be shipped was not delivered. It is consistent with this that all actually shipped was delivered. That being so, the plaintiff has performed his contract, and is entitled to the lump freight. The only answer to his claim is founded on the 3rd section of the Bills of Lading Act, and it is contended that the statement of weight in the bill of lading estops him. Now, if the bill had acknowledged the receipt of certain specific things—a certain number of horses, for instance—it might be that the plaintiff could not be heard to say that a different number was shipped in fact. But that cannot be said of a mere statement of weight, which may, and often does, vary during the transit; and I do not see any estoppel, therefore, to prevent the plaintiff from saying that the measurement was wrong, it not being suggested that a wrong weight was inserted fraudulently in order to enhance the lump freight recoverable. All the bill of lading means is “Received the cargo fairly weighed.” The replications, therefore, seem to me to be good.

*Judgment for the plaintiff.*

Attorneys for plaintiff: *Ingledew, Ince, & Greening.*

Attorney for defendants: *Gosling.*

DICKESON *v.* HILLIARD AND ANOTHER.

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Jan. 20.

*Defamation—Privilege—Communication by one Election Agent to Another—  
Parliamentary Election—Time for Petition—Interest or Duty.*

F. and B. were candidates at a parliamentary election. The defendants were agents of B., and on the day of the election, whilst the poll was proceeding, one of them wrote to the agent of F., stating that bribery on F.'s behalf was going on. B. was returned, and on the next day the plaintiff's name was mentioned by the same defendant to F.'s agent as that of a briber. A discussion upon the imputation ensued, which resulted in the defendants transmitting to F.'s agent on the day following a document signed by both of them, "certifying" that the plaintiff had been personally guilty of bribery.

In an action of defamation brought upon this document :—

*Held*, that the occasion was not privileged.

*Quære*, whether it would have been privileged if a petition against the return of B. had been presented or contemplated, the twenty-one days during which such a petition might have been presented not having elapsed.

DECLARATION that, before the time of the committing of the grievances complained of, one T. S. Forbes was a candidate for the representation in Parliament of the borough of Dover, and the defendants, William Edward Hilliard and Evan Hare, falsely and maliciously wrote and published of the plaintiff the words following :—

"Dover election, 1873. We certify that we have discovered that Mr. Dickeson (meaning thereby the plaintiff) and Mr. Robinson (1) have been personally guilty of offering 1*l.* 10*s.* to a voter for his vote, and 1*l.* 10*s.* for every vote he could procure for Mr. Forbes. The elector referred to has been personally examined by one of us, and evidence, which he is prepared to give on oath, is clear and distinct. Dated 24th September, 1873. William Edward Hilliard, chairman ; Evan Hare, Mr. Barnett's agent."

Plea : Not guilty. Issue.

The cause was tried before Kelly, C.B., at the London sittings after Michaelmas Term, 1873, when the following facts were proved : In September, 1873, there was a contest for the representation of the borough of Dover between Mr. Forbes on the side of the Liberal party, and Mr. Barnett on that of the Conservative

(1) Mr. Robinson was plaintiff in a similar action to the present, and recovered a verdict for 225*l.*

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party. The plaintiff was one of the chairmen of a district committee formed to promote the return of Mr. Forbes. The defendant Hilliard was chairman of Mr. Barnett's committee, and the defendant Hare was his election agent. The polling took place on the 22nd of September, 1873, and resulted in the return of Mr. Barnett. In the course of that day, whilst the poll was being taken, the defendant Hare made a communication to a Mr. Hall, the election agent of Mr. Forbes' committee (between whom and himself an agreement had previously been made that neither party should resort to any corrupt practices), to the effect that two prominent members of Mr. Forbes' committee had been offering money to voters to poll for Mr. Forbes, and that, in consequence, Mr. Barnett would take whatever steps he might be advised. The following day Hall and Hare met, and the plaintiff's name was then mentioned by Hare as that of one of the persons implicated. Mr. Hall stated that if the allegations made as to the plaintiff were properly proved to be true, he would recommend such a course to be adopted as would render a prosecution inexpedient, and the defendant Hare promised to furnish the necessary evidence, and said an apology must be made.

On the 24th of September a certificate, signed by both defendants, and a form of proposed apology was forwarded to Mr. Hall, inclosed in a letter signed by the defendant Hare. The certificate was to the effect above stated in the declaration. The apology proposed contained an undertaking intended for signature by the plaintiff and Mr. Robinson, "in consideration of Mr. Barnett's committee consenting not to prosecute us," to take no part in politics for two years. There was no foundation for the imputation of bribery, and the plaintiff refused to sign the apology forwarded to Mr. Hall, and brought this action.

It was contended, under these circumstances, that the defamatory document was privileged. The learned judge ruled, as a matter of law, that it was not, but further left it to the jury to say whether there was anything to clothe the communication with privilege, and if they thought there was, and that there was no express malice, to give the defendants the benefit of it and find a verdict for them. The jury found a verdict for the plaintiff, damages 225*l*.



Jan. 12, 20. *Giffard, Q.C.*, for the defendant Hilliard, and *E. Clarke*, for the defendant Hare, moved for a new trial, on the ground of misdirection on the part of the learned judge in that he did not tell the jury that the words were written on a privileged occasion and direct them to find a verdict for the defendants. The communication comes within the rule laid down in *Toogood v. Spyring* (1) and *Harrison v. Bush*. (2) It was made bonâ fide upon a subject in which the parties communicating had an interest to a person having a corresponding interest. The polling was over, it is true, but the twenty-one days during which a petition might have been presented under the Parliamentary Elections Act, 1868 (32 & 33 Vict. c. 125), s. 6, had not elapsed.

[*KELLY, C.B.* There was no suggestion at the time that a petition was in contemplation. If there had been one either actually filed or proposed to be filed, the case might possibly have been altered.]

It was impossible for the defendants to be sure no petition would be filed, and the communication was one which they were justified in making to the person who would probably decide what course the defeated candidate should adopt. The rule of privilege has been extended of late years (see per *Erle, C.J.*, in *Whiteley v. Adams*). (3) It is enough that there was a chance of a petition. A confidential relation had certainly been established between the defendants and Hall prior to the election, and that being so, everything said or written which might be fairly attributed to that relation was protected: *Beatson v. Skene*. (4)

[They also referred to *Coxhead v. Richards* (5) and *Fryer v. Kinnersley*. (6)]

*KELLY, C.B.* I am of opinion that this rule should be refused. The case has been ably argued by Mr. Giffard and Mr. Clarke, but they have not succeeded in convincing me that the libel complained of was in any sense a privileged communication. I may say, in passing, that although I thought at the trial there was no evidence that the occasion was privileged, I asked the jury whether

(1) 1 C. M. & R. 181.

(2) 5 E. & B. 344.

(3) 15 C. B. (N.S.) 392; 33 L. J. (C.P.) 89.

(4) 5 H. & N. 838; 29 L. J. (Ex.) 430.

(5) 2 C. B. 569.

(6) 15 C. B. (N.S.) 422; 33 L. J. (C.P.) 96.



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they thought there was anything in the nature of the relations between the parties that made the communication justifiable; and I told them that if they did think so, and also were of opinion that no express malice was proved, then they should find a verdict for the defendants. They found, however, for the plaintiff, and the question for us is now one of law, whether I ought to have directed them to find for the defendants, upon the ground that the words complained of were protected by the occasion upon which they were published. Now the libel declared upon is this [the learned judge read the words of the declaration]; and if there had been a mere statement that some voter had declared that the plaintiff had offered him a bribe, that might possibly have been protected as being a warning which the defendants were justified in giving to those who represented Mr. Forbes. But the document is much more than this. It is a certificate that the defendants have discovered that the plaintiffs have been guilty of personal bribery; and I can see nothing in the character of Hall, to whom it was addressed, or in the relation between him and the defendants, to clothe it with the immunity afforded by law to statements passing between persons who have a common interest or duty with respect to the subject-matter of such statements. Hall was not a person who had jurisdiction either to punish or to inquire into the alleged bribery by the plaintiff, or who was invested with authority to institute proceedings in respect of it; and the case does not fall within any of the classes to which the doctrine of privilege has hitherto been held applicable.

The first of these classes includes cases like that of *Harrison v. Bush*. (1) There the plaintiff, who was a magistrate, was charged with neglect of duty, and the defendant made the communication complained of to the then Home Secretary, with a view to procure the plaintiff's removal from the commission of the peace. The only question was, whether this communication was addressed to the proper person, and it was contended that it should have been addressed to the Lord Chancellor. It was, however, held that the appointment and removal of justices rest with the sovereign, and that although she usually acts through the Lord Chancellor, she might also act through the Secretary of State, and

(1) 5 E. & B. 344; 25 L. J. (Q.B.) 25.

that, therefore, a communication addressed to him as to the alleged misconduct of a magistrate was covered with the same privilege as though it had been addressed to the Queen herself. It was a communication addressed to one in authority, with a view to the institution of judicial proceedings. Clearly it is no authority in the present instance, where the person addressed had no power either to prosecute or institute an inquiry into the conduct of the persons accused.

The second class of cases where privilege has prevailed, is that of military offences, where a court of inquiry into alleged misconduct is either being or about to be held; and a communication made, either to the Court or before the Court is held, with a view of assisting the Court is held privileged, because the proceedings, if not strictly judicial, are in the nature of judicial proceedings, and it is the duty of every one concerned to give information which may assist in the proper prosecution of the inquiry. Such were the cases of *Dawkins v. Lord Rokeby* (1) and *Beatson v. Skene*. (2) The policy of the law covers, and rightly covers, such information with privilege.

The third class of privileged communications is of a different nature and consists of cases where the defendant makes a defamatory statement to some one who applies to him for information and to whom he has a moral or social, if not a legal, duty. The most familiar instance is that of giving a character to a servant, where a libel, if bonâ fide published and without express malice, is shielded. Other cases might be put; for example, a statement made by one member of a vestry or club defamatory of another, to persons who had an interest in hearing it. But I know of no case which covers the present, where, after the election was over, the defendants take upon themselves to certify that the plaintiff has committed an act of bribery, and make their certificate to one who has no authority or duty either to punish or to inquire into the truth of the allegations made, and who did not invite the statement. There should therefore be no rule.

FIGOTT, B. I am of the same opinion. I do not think that my Lord misdirected the jury in this case. He decided, and in my

(1) Law Rep. 3 Q. B. 255.

(2) 5 H. & N. 838; 29 L. J. (Ex.) 430.

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judgment rightly decided, that the occasion upon which the defamatory statement complained of was published was not privileged; and he moreover left it to the jury to say whether the relation between Hall and the defendants could render the communication justifiable. The question is really one for the judge, and it is now before us as one of law. Now the legal canon as to privilege is well enunciated in *Harrison v. Bush* (1) in these words: "A communication made bonâ fide on any subject-matter in which the party communicating has an interest or in reference to which he has a duty is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter, which without this privilege would be actionable"; and in the same case the word "duty" is explained as including what may be called a duty of imperfect obligation, a moral or a social duty. It seems to me that the facts proved at the trial do not shew that any duty whatever was cast upon the defendants to publish the certificate complained of. There was an election proceeding at Dover, at which Messrs. Forbes and Barnett were the candidates. Mr. Hall was the election agent for Forbes, and the plaintiff was a member of one of the ward committees. The defendants held corresponding offices on Barnett's side. On the 22nd of September the polling took place, and on that day a communication was made by Hare to Hall, that bribery was going on upon Forbes' side. If this had been the libel which is the subject-matter of this action a serious question of privilege might have arisen. But it is not so. No doubt the statement made on the 22nd was to some extent the foundation of the subsequent libel. Hall directed some inquiry to be made, but no result immediately followed. The next day Hall, without any communication with the plaintiff, wrote to Hare, asking for an interview, which accordingly took place. Hall then requested Hare not to prosecute the parties supposed to be guilty, and went on to say that if prosecution was forborne, and if he was properly certified that bribery had been committed by the plaintiff, whose name was first mentioned at this interview, he would take measures which would render it unnecessary or inexpedient to prosecute. Upon that the defendant Hare wrote out, and both he and Hilliard signed, the certificate

(1) 5 E. & B. at p. 348.

declared upon, and sent it the next day (the 24th of September) to Hall. It contains grossly defamatory matter; and I cannot see any interest or duty which rendered it privileged. The defendants were committeemen of one candidate, and Hall was agent of the other, and if the election had been proceeding, possibly an interest or duty might have been held to exist. But on the 24th the election was at an end. Hall had no authority to prosecute the plaintiff, nor any legal control over him. His interest or duty, if he ever had one, had ceased.

It was contended that it was possible a petition might have been presented. But this is a mere hypothesis, and cannot clothe the certificate with immunity. Hall was in fact a volunteer, stepping forward without any authority from the plaintiff, to defend him, or to shield him from the consequences of the offence which it was asserted he had committed. For these reasons I agree with my Lord, that there was no privilege, and the rule must therefore be refused.

POLLOCK, B. I am also of opinion that there should be no rule. The rule as to privilege has in modern times been somewhat enlarged, and I do not wish to narrow it. It is, however, equally important to see that persons are not allowed by their own acts to constitute an occasion privileged which would otherwise not be privileged, having regard to the relations which naturally exist between them. It is said that this certificate was published by the defendants to Hall in pursuance of an interest or duty. But Hall had no authority to prosecute the offenders; and I cannot see anything in the circumstances to warrant me in holding that the defendants and Hall had any common interest or duty whatever. No inquiry was made of the defendants in response to which the defamatory statement was made. The defendants volunteered it, and to hold that just because Hall was the election agent of another candidate at an election, which was over, the occasion was privileged, would be going far beyond what any cases have hitherto justified.

*Rule refused.*

Attorneys for plaintiff: *Bower & Cotton.*

Attorneys for defendants: *Dryden; Hare.*

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## HIORT v. BOTT.

*Conversion—Goods sent by Mistake—Intention to Appropriate the Goods.*

The plaintiffs sent to the defendant an invoice for barley, which stated that the barley was bought by the defendant of the plaintiffs through G. as broker, and also a delivery order, which made the barley deliverable to the order of the consignor or consignee. The defendant had not in fact ordered any barley of the plaintiffs. G. called on the defendant, who showed him the documents, and told him it was a mistake. G. said that it was so, and asked the defendant to indorse the order to him, for the purpose, as he said of saving the expense of obtaining a fresh delivery order. The defendant indorsed the order to G., who possessed himself of the barley and disposed of it, and then absconded.

On the trial of an action of trover for the barley, the jury found that the defendant had no intention of appropriating the barley to his own use, but indorsed the order for the purpose of correcting what he believed to be an error, and returning the barley to the plaintiffs:—

*Held*, that the defendant, having indorsed the order without any occasion to do so, and without authority, was liable.

ACTION of trover for barley, tried before Archibald, J., at the Staffordshire Summer Assizes, 1873.

The facts were as follows:—The plaintiffs, who were corn merchants, trading under the name of Brochner and Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th of June, 1872, forwarded to the London and North Western Railway station at Birmingham 83 quarters of barley, and at the same time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be “sold by Mr. Grimmett as broker between buyer and seller,” and a delivery order, which made the barley deliverable “to the order of consignor or consignee.” The barley had in fact never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmett. A day or two after the receipt of these documents by the defendant, Grimmett called; the defendant produced the documents, and said, “What does this mean? I never bought any barley through you off Brochner and Co.” Grimmett said “it was a mistake of Brochner and Co.; they had no doubt confused the defendant’s name and some other name; they were



doing a large business, and might have made a mistake." Grimmett then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmett, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented.

The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for 180*l.*, the value of the barley. A rule having been obtained accordingly,

Feb. 10. *Jelf* (*Powell, Q.C.*, with him) shewed cause. The cases in which trover will lie are enumerated by Alderson, B., in *Fouldes v. Willoughby* (1) as follows: "The true principle is that stated by Chambre and Holroyd, J.J., when at the bar, in their argument in the case of *Shipwick v. Blanchard* (2), that 'in order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting.' This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion." That statement is adopted in 2 Notes to Saunders, p. 108, in these words: "The taking or detention of the chattel must be with intent to convert it to the taker's own use, or that of some third person; or the act done must have the effect of destroying or changing the quality of the thing." Another test is suggested by the judgment of Cleasby, B., in *Fowler v. Hollins* (3), that the act must be one "dealing with the property." Tried by any of these rules, there was here no conversion; for the defendant intended nothing but

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(1) 8 M. &amp; W. 540, at p. 549.

(2) 6 T. R. 299.

(3) Law Rep. 7 Q. B. at p. 639.

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to return the barley to the plaintiffs, and had no thought of dealing with the property. Tried by the test of reason, the result would be the same. For if a man has goods sent to him which he has never ordered, whether by mistake, or on approval, or by way of advertisement, he becomes an involuntary bailee, and is called upon by the act of the sender to do something with them, unless he means to keep the goods as his own. Then what is he to do? It is certainly not unreasonable that he should take steps to return them to the sender; and unless in what he does he is guilty of gross carelessness, he ought not to be held liable for their miscarriage. That is what the defendant has done here; he took steps to return the goods to the owners through the owners' agent; and he ought not to be made liable for that agent's fraud. His position is the same as, or better than, that of the defendants in *Heugh v. London and North Western Ry. Co.* (1), and *M'Kean v. M'Ivor*. (2)

*Bosanquet* (*Huddleston, Q.C.*, with him) in support of the rule. It is enough to constitute a conversion if the defendant, by means of an unauthorized act, has deprived the plaintiffs of the possession of their goods, either permanently or for an indefinite time. This is the effect of the decision in *Fowler v. Hollins* (3), and agrees with what is said by Alderson, B. in *Fouldes v. Willoughby* (4), and cited and approved by Martin, B. in delivering the judgment of the Court in *Burroughes v. Bayne*. (5) "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another it is a conversion." Here the defendant has certainly done an unauthorized act, and one which was without excuse. There was no occasion for him to deal with the barley at all; for it was not in his possession, and no act of his was required to give the plaintiffs possession of it. His case is therefore wholly unlike that of an involuntary bailee, who has, against his will, the actual custody of the goods. That he did

(1) Law Rep. 5 Ex. 51.

(4) 8 M. &amp; W. 540.

(2) Law Rep. 6 Ex. 36.

(5) 5 H. &amp; N. 296, at p. 303; 29 L.

(3) Law Rep. 7 Q. B. 616.

J. (Ex.) 185.

not mean to appropriate the barley to his own use is immaterial, if his act deprived the plaintiffs of their property.

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BOTT.*Cur. adv. vult.*

Feb. 12. The following judgments were delivered:—

BRAMWELL, B. This case was argued before my Brothers Pigott and Cleasby and myself, and we are all of opinion that the rule must be made absolute. [After stating the facts the learned judge proceeded:—]

I think the plaintiffs are entitled to recover; though, so far as concerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is “converted to his own use;” but that does not mean that the defendant consumed the goods himself; for, if a man gave a quantity of another person’s wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus: that by an unauthorized act on the part of the defendant, the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who, deprived the plaintiffs of them. The conversion is therefore made out.

Various ingenious cases were put as to what would happen if, for

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instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street. That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it—that is, to send it back by a trustworthy person? And when you say, “Go and deliver it to the person who sent it,” are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett’s request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is therefore a distinction between the case put and the present one. And there is also a distinction between the case of *Heugh v. London and North Western Ry. Co.* (1), which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person applying for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: “We, the plaintiffs, had at the London and North Western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing with it. Nevertheless, you ordered the London and North Western Railway Company to deliver it, without any authority, to Grimmett, who took it away.” Would not that have been a logical and precise statement of a tortious act

(1) Law Rep. 5 Ex. 51.



on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs.

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CLEASBY, B. I am of the same opinion, and shall only add a few words for the purpose of making the ground of decision clearly understood, and of shewing that we are not questioning or overruling any of the authorities referred to.

It should be particularly noticed in this case that the plaintiffs had not, by what they had done, placed the defendant in any position of difficulty, as is often the case with an involuntary bailee (an expression often used in the argument) who has received property into his possession for a purpose which cannot, as it afterwards appears, be exactly carried into effect, and who does his best and acts in a reasonable manner for carrying into effect the purpose of the bailment. In such cases the bailee has a duty to perform in relation to the goods, and he is placed in a difficulty in the discharge of that duty by the default of the plaintiff, who ought not to be allowed to complain if, under that difficulty, the bailee has acted in a manner which is considered reasonable and proper.

But no difficulty of that sort arises here, because the goods were consigned to the order of the consignee or consignor; and the defendant, being the consignee and in possession of the order, must have known that there was some mistake in making him consignee, and so the goods were properly deliverable to the order of the consignor. He had no duty to perform in relation to the goods, and was a mere stranger, except that by mistake he had been made consignee, and so had an ostensible title, and could dispose of the goods. This distinguishes the present case from the cases against railway companies referred to in the argument.

It is also to be observed that the present case is different from a class of cases referred to in the argument, in which some act is done to goods, such as shoeing a horse, packing goods, or forwarding them on. In these cases no act is done having reference to the property in the goods or the right to the possession of them. The act is consistent with the title of any person. But in the



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present case the act of the defendant transfers the title to the possession of the goods, so as to cause them to be lost to the real owner.

The jury have found that the defendant did not intend to appropriate them to himself by the transfer, but intended them to be returned to the plaintiffs. According to the evidence, the object of the transfer was not to have the goods actually returned to the owner, but to dispense with the necessity of sending to the plaintiffs for a fresh order making the goods deliverable to the real purchaser; and, although it does not make any real difference, this must have been what the jury meant, because by the form of the note the goods were at the disposal of the plaintiffs if the defendant did nothing.

The ground of the decision in the present case is that the defendant had no title whatever to the goods—that there was no necessity whatever for his interfering in any manner in the disposal of them, but that he improperly, though innocently—being prevailed upon to do so by Grimmett—having the indicia of title, by mistake, as he knew, transferred that title to the possession of Grimmett. I think a person who deals with the property in this way does so at his peril, and if by means of it a fraud upon the owner is accomplished, he is responsible.

It was not left to the jury in this case to say whether the conduct of the defendant was reasonable and proper, but I do not think that this was necessary. No objection was made on the argument that this had not been done; but it was unnecessary, because to transfer voluntarily the title to the possession of goods, in which you have no interest whatever, to a third person is, in my opinion, under the circumstances of the present case, obviously improper and unreasonable; and that is the ground of my judgment.

*Rule absolute.*

Attorneys for plaintiffs: *Chester, Urquhart, & Co., for Arnold & Son, Birmingham.*

Attorney for defendant: *Rogers, for Powell, Birmingham.*

VAUGHTON v. THE LONDON AND NORTH WESTERN RAILWAY  
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Jan. 28.

*Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 8—Felony of Carrier's Servants—Evidence.*

In an action against carriers for loss of the plaintiff's goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of the defendants' servants than by any one not in their employment; and it is unnecessary to give such evidence as would suffice to convict any particular servant.

DECLARATION, 1st count, for delay in delivering certain goods of the plaintiff, by him delivered to the defendants as carriers, to be carried from Birmingham to Liverpool; 2nd count, for the loss of the goods.

Plea, alleging that the breaches of duty in the declaration alleged were by reason of the loss of the goods, and shewing that the defendants were entitled to the protection of the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68).

Replication: that the loss arose from the felonious acts of servants in the employ of the defendants. Issue.

At the trial before Honyman, J., at the Warwick Summer Assizes, 1873, it was proved that the goods lost consisted of a parcel of jewelry worth more than 10*l.*, delivered on the 29th of January, 1873, by the plaintiff, a Birmingham jeweller, to the defendants, to be carried by them to Liverpool and there delivered, at Lawrence's Hotel, to one Holland, his Liverpool traveller. It was admitted that the goods were duly delivered to the defendants at Birmingham, and that no declaration of value was made. The delivery at Lawrence's Hotel should, in the ordinary course, have been made by a person named Thurston, who is the defendants' Liverpool agent for the delivery of goods. On the 30th of January Thurston's van, under the charge of a carman, arrived with some parcels at Lawrence's Hotel. According to the entry in the carman's book, the plaintiff's parcel should have been among these. The carman brought two parcels into the hotel, and then presented his book for signature to the housekeeper, who was about to sign,

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when the proprietor of the house, observing that only two parcels had been brought in, whereas the book mentioned three, called the carman's attention to the fact. He did not seem aware that the number of parcels delivered and to be signed for did not correspond, and returned to the van to search for the missing parcel, and afterwards sent his boy to the defendants' station in Lime Street, Liverpool, to inquire for it. The search proved fruitless. A few days afterwards some of the missing articles were seen in a pawnbroker's shop, and inquiries were instituted which resulted in the arrest of two men not in the employment of the defendants. These men were afterwards discharged, there being no evidence against them ; but whilst in custody they made a statement which induced the police, on the 10th of February, to search a fish siding close to the Lime Street Station, and only about 100 yards from the place where the parcel vans were usually loaded. Both the siding and the place of loading were on the defendants' premises, and to both it was possible for the public to have access. The police found upon the siding some pieces of wood which were identified as a part of the box in which the plaintiff's jewelry had been placed, and also a horse-shoe pin which had been in the parcel. It further appeared that a servant of the defendants, had, four days previously, found another pin on the siding, but, not thinking it was of any value, had said nothing about his discovery. The learned judge left to the jury to say whether, under the circumstances, they were of opinion that the goods had been lost through the felony of the defendants' servants. The jury found for the plaintiff, damages 47*l*. A verdict was entered accordingly, with leave to move to enter a verdict for the defendants, on the ground that there was no evidence of felony on the part of the defendants' servants. (1) A rule was obtained in Michaelmas Term, 1873, in pursuance of the leave reserved.

*Digby Seymour, Q.C., and Forbes*, shewed cause. There was

(1) The 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, enacts that carriers are not to be liable for the loss, inter alia, of jewelry above the value of 10*l*., unless the value is declared ; and by s. 8 it is provided that nothing in the Act shall protect

any common carrier from liability for loss or injury to goods "arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant" in the carrier's employ.

ample evidence for the jury in support of the replication, although possibly no such evidence as would have warranted the conviction of any particular servant of the company. It is not necessary to offer evidence which would insure a conviction of any servant in particular, or even the finding of a true bill against him: *Boyce v. Chapman* (1); it is enough to shew facts which, unless explained, would warrant the inference that some one or more persons in the defendants' employ were guilty. Thurston and his servants are the servants of the defendants within the meaning of s. 7 of the Carriers Act: *Machu v. South Western Ry. Co.* (2)

*Field, Q.C.*, and *Carter*, in support of the rule. The evidence here is equally consistent with the felony having been committed, either by some or one of the defendants' servants or by other persons; but, in order to support the replication, the evidence must be more consistent with the guilt of the defendants' servants than with the guilt of any one else. In *Great Western Ry. Co. v. Rimell* (3) it is said, by Willes, J., in reference to the evidence necessary to support a similar replication, that there must be "some one substantial, credible fact" inconsistent with the theory that some other person was the thief; and again, in *Metcalf v. London, Brighton, and South Coast Ry. Co.* (4), the same learned judge says that "to make out a *primâ facie* case, the plaintiffs ought to shew, not only that the theory of a felony having been committed by one of the company's servants is consistent and probable, but that there is some one fact which is wholly inconsistent with a contrary theory." Now, here no fact was proved which was "wholly inconsistent" with the goods having been stolen by somebody not in the defendants' employment. Certainly there was no evidence to fix guilt upon any particular servant of the company; but if the replication is held to have been proved, it will cast suspicion upon all the servants of the company who were in any way concerned with dealing with the goods. It may be said that the defendants should have called their servants as witnesses; but if the defendants' contention is correct, there was no case for them to answer.

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KELLY, C.B. I am by no means prepared to say that the evi-

(1) 2 Bing. (N.C.) 222.

(3) 18 C. B. 575; 27 L. J. (C.P.) 201.

(2) 2 Ex. 415.

(4) 4 C. B. (N.S.) 307; 27 L. J. (C.P.) 333.



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dence in this case is such as would have sustained a criminal prosecution against any servant of the company, or indeed that there was a case which a judge would have been justified in leaving to the jury against any of them. But we ought to deal with this case upon a different principle, and not insist upon evidence which would convict any particular individual. Suppose, for example, that a railway company have possession of a parcel to be forwarded on the day following its being received. Suppose that in the interval it is locked up in a cupboard to which two of their servants, and only two, have a key, and that it is stolen in the night, under circumstances which irresistibly lead to the inference that one or other of these two persons must be the thief. It might well be that it would be impossible to bring home the crime to either, and that if either was put upon his trial, he would be entitled to an acquittal. But in such a case, could it be doubted that a replication of felony to a plea of the Carriers Act would be proved? The language of the Act itself, it must be remembered, is general. The felony of "any coachman, &c., or other servant," is enough to charge the defendants with liability.

There is, moreover, in my opinion, another ground why a broad distinction may properly be drawn between the sort of evidence which is required to prove the replication of felony and to prove an indictment. I refer to the fact that in the civil proceeding the parties implicated are competent witnesses, and can be called to rebut any *prima facie* case which may be made out against them. The absence from the witness box of the persons who might have explained anything which may have appeared suspicious is in itself a matter which the jury are entitled to consider, and the defendants' failure to adduce evidence which might have cleared up all doubts was in *Boyce v. Chapman* (1) (a case very similar to the present), considered by Tindal, C.J., to be sufficient reason for not interfering with the verdict of the jury. Mr. Carter, in his able argument, dwelt emphatically on the hardship on all the servants of the defendants who were in any way connected with the carrying of the plaintiffs' goods of allowing a verdict to stand which fixes an imputation upon all of them. The answer to that observation is that the defendants might have called their suspected servants

(1) 2 Bing. (N.C.) 222.

as witnesses. They did not think it proper to do so, and therefore cannot now complain.

Now as to the evidence itself, I certainly think there was no case against the carman, which could have been left to the jury on the Crown side. His act in requesting or permitting the servant at the hotel to sign for three parcels when he had only delivered two, is a circumstance requiring the explanation which very probably he would have readily given if he had been allowed to appear as a witness; but it is certainly not enough even to leave to a jury on a criminal charge.

With regard to the servant who found the pin the case is somewhat stronger, for he unquestionably was in possession of some of the stolen property shortly after it had been stolen. That would have been some evidence for a jury that he was concerned in the larceny. I do not for a moment say that the fact could not have been explained, but here again the defendants did not allow an explanation to be given. The rule, therefore, must be discharged. As in *Boyce v. Chapman* (1), the evidence was slight, but it required, and did not receive, an answer.

PIGOTT, B. I am of the same opinion. The question is whether there was evidence to support this replication, and it has been contended that the evidence required must be such as would suffice to convict some particular servant of the defendants. But I cannot assent to that argument. I read the judgment of Willes, J., in *Metcalfe v. London, Brighton, and South Coast Ry. Co.* (2), as amounting to this, that evidence must be given shewing it to be more likely that the servants of the company stole the goods than that any one else did. That is very different from saying that the evidence must be such as would convict this or that particular servant. In the present case I think the evidence given was more consistent with the guilt of the defendants' servants than with that of any person not in their employment, for the defendants' servants had greater opportunities than others. That being so, there was a case for the jury, the onus of answering which was upon the defendants. They might have answered it by calling

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(1) 2 Bing. (N.C.) 222.

(2) 4 C. B. (N.S.) 307; 27 L. J. (C.P.) 333, at p. 334.

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the servants towards whom suspicion was directed, but they determined not to call witnesses. They preferred to leave the matter unexplained. It is impossible, under these circumstances, to say that there was no evidence for the jury.

AMPHLETT, B. I am also of opinion that there was evidence in support of this replication. It has been forcibly contended that the evidence should be such as to bring home the felony to some particular servant of the company; and if that were so, I should pause before deciding, at all events, as to one of the servants in question—the carman—that there was any evidence which ought to be left to a jury if he were upon his trial; whilst as to the other, although I am far from saying that his conduct is not susceptible of easy explanation, still, if it were necessary to decide the point, I should say that there was a case against him which required an answer. But it is not needful to go so far. For I agree with my Lord and my Brother Pigott that it is sufficient to shew that some servant of the company was guilty, and not necessary to bring the offence home to any servant in particular. As to the remarks which have been made to us upon the effect of the verdict upon the characters of all the defendants' servants who had anything to do with this box of jewelry, it must be remembered that they were all competent witnesses, and might have been called to explain what, in the case of one of them at least, required an explanation; and the fact that they were not called was itself a circumstance which we are entitled to consider when deciding whether or not there was a question for the jury.

*Rule discharged.*

Attorneys for plaintiff: *Barton, Yeates, & Hart.*

Attorneys for defendants: *R. F. Roberts.*

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*Covenanting for Title and for Quiet Enjoyment—Continuing Breach—Statute of Limitations (3 & 4 Wm. 4, c. 42) s. 3—Minerals—Support.*

In 1844 the defendant was party to a twenty-one years lease of coal mines, which gave certain powers over the surface incidental to the working of those mines and an adjoining colliery. The coals so demised were substantially worked out before September, 1845. In October, 1845, the defendant sold and conveyed the land to J., who knew of the workings, and the defendant covenanted with him for title, for quiet enjoyment, and against incumbrances. In July, 1846, J. sold and conveyed to the plaintiff, who was ignorant of the workings. In 1865, in consequence of the mining operations above described, the land subsided, and houses built on it by J. and the plaintiff were damaged.

In 1848, subsequently to the plaintiff becoming owner of the land, and within twenty years before action, the lessees, or persons acting under their authority, entered the mines and took some fire-clay (which was not included in the demise) and a few loose pieces of coal.

In an action brought on the above covenants, the declaration in which alleged that *whilst the plaintiff was seised* the lessees entered upon the land, and worked, got, and carried away the coal, whereby the plaintiff lost the coal, and the land subsided :—

*Held* (by the Court), that as to the breach of the covenant for quiet enjoyment by the removal of coal which caused the subsidence, there was a fatal variance between the declaration and the evidence, which under the circumstances the Court declined to amend.

By Bramwell and Cleasby, BB. First, that the fact of the coals having been worked out was no breach of the covenant for title, J. never having bought those coals; that the subsistence of the lease in respect of the coal left unwrought and the powers (not exercised) incident to the working of other collieries, did not constitute a breach; that the breach (if any) was complete in the time of J., and (by Bramwell, B.) that the action was barred by the Statute of Limitations.

Secondly, that neither the acts of trespass in taking the fire-clay, in 1848, nor the subsidence caused in 1865 by the workings in 1845, were breaches of the covenant for quiet enjoyment, on the ground that the first was a mere trespass, and that as to the second, the subsidence gave no new cause of action; the principle of *Bonomi v. Backhouse* (9 H. L. C. 503) not applying to a case where the subsidence is caused by a wrongful taking of the plaintiff's minerals.

By Kelly, C.B. First, that the subsistence of the lease was a continuing breach of the covenant for title, in respect of which the plaintiff was entitled to nominal damages.

Secondly, that the removal of the small pieces of coal, in 1848, was a breach of the covenant for quiet enjoyment, in respect of which the plaintiff was also entitled to nominal damages.

Thirdly, that, the removal of the coal by the lessees being lawful, the subsidence in 1865 gave a new cause of action to the plaintiff.

SPECIAL CASE stated with pleadings.

The case stated as follows :—

This action was commenced on the 6th of July, 1867.



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On the 28th of June, 1842, T. C. Granger conveyed to the defendant twenty-eight acres of land at Low Bitchburn, Durham, without any exception of mines or minerals. The consideration was expressed to be the sum of 740*l.*, but it was at the same time arranged that the defendant should hold the land for the sole benefit of T. C. Granger, which he continued to do, acting for and under the direction of Granger.

On the 15th of December, 1842, the defendant mortgaged the land to Boyd and others.

By a memorandum of agreement dated the 23rd of July, 1844 (1), T. C. Granger agreed to let to J. Smith and J. Sharp, who agreed to take and accept a lease of, "all the veins or seams of coal within and under the lands and grounds of the said T. C. Granger situate at Low Bitchburn," described as consisting of twenty-eight acres, with power for the lessees, their executors, administrators and assigns "to enter upon the said lands and grounds, and to dig for, sink, win, and work the several seams of coal lying and being within and under the same, and to draw the coals so gotten thereupon, or which should or might be gotten by the lessees forth and out of the adjoining lands called Thistle Flatt, to bank on the said lands and grounds of the said T. C. Granger, and to lead and convey the said coals so to be gotten, as well in, from, and out of the said lands and grounds last mentioned, as in, from, and out of the said adjoining lands called Thistle Flatt, over and along the said lands and grounds of the said T. C. Granger; and with all other powers and privileges fit and necessary for the convenient winning and working, getting, and conveying away all the said coals so to be gotten, as aforesaid, upon and subject to the terms and conditions hereinafter mentioned;" by which conditions the term was to be twenty-one years from the 1st of July, 1844, but which, having regard to the findings in the case, it is not material to state further.

This agreement was signed by the defendant as follows: "For T. C. Granger, William Green."

On the 4th of April, 1845, the defendant and the mortgagees, under the mortgage of the 15th of June, 1842, which was then paid off, mortgaged the land in fee to Mr. Pearson.

On the 27th of October, 1845, the defendant and Pearson conveyed a small portion of the land to one Jamieson, his heirs and

assigns, to such uses as he should appoint, and subject thereto to the use of a dower trustee in trust for Jamieson during his life, with remainder to the use of Jamieson, his heirs and assigns; and by this deed the defendant for himself, his heirs and assigns, covenanted with Jamieson, his appointees, heirs, and assigns, that notwithstanding any act, deed, matter, or thing done or permitted by the defendant or by Pearson to the contrary, the defendant and Pearson had, or one of them had, good right to grant, release, and convey the said hereditaments thereby conveyed, with the appurtenances, unto and to the use of, or in trust for, Jamieson, his heirs and assigns, in manner aforesaid; and that it should be lawful for Jamieson to enter upon and enjoy the said hereditaments with the appurtenances, and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption whatsoever from or by the defendant or Pearson, their or either of their heirs, executors, administrators, or assigns, or any person claiming through or in trust for them; and that, free and clear, or otherwise by the defendant, his heirs, executors, or administrators, well and sufficiently indemnified from and against all estates, titles, liens, charges, and incumbrances whatsoever.

Jamieson entered into possession and built a dwelling-house on part of the land conveyed to him.

On the 30th of July, 1846, Jamieson sold part of the land to the plaintiff, and appointed it to the use of the plaintiff, his heirs and assigns; and on the 21st of August, 1846, he sold to the plaintiff the remaining part with the dwelling-house, appointing it to the use of the plaintiff, his heirs and assigns. The plaintiff afterwards built other houses on the land so conveyed to him.

Shortly after the agreement of the 23rd of July, 1845, Smith and Sharp commenced to work the coal included in the agreement, and sank a shaft in the twenty-eight acres about sixty yards east of the land afterwards conveyed to Jamieson.

On the 24th of December, 1865, the surface of plaintiff's land subsided, in consequence of the mining operations of Smith and Sharp, and his houses were greatly damaged. The plaintiff required the defendant to indemnify him, but the defendant refused.

The subsidence was caused by mining operations carried on under

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the land conveyed to the plaintiff, before the conveyance to him of any part of the land, and which consisted of workings in the coal leaving walls and pillars. Between the 1st of August, 1846, and the 6th of July, 1847, and between the 6th of July, 1847, and the 1st of August, 1848, Smith and Sharp, or persons acting under their authority, dug out and took away some of the fire-clay which formed the floor of the workings, and at the same time took and carried away some pieces of coal which had from natural causes fallen from the sides of the walls and pillars of coal left in the working upon the floors of the workings, and pieces of coal forming the sides of the walls and pillars which had from natural causes become broken and partially detached from them.

None of these last-mentioned operations, however, in any way contributed to the subsidence.

Except as above stated, the defendant had not authorized any of the operations carried on under the plaintiff's land, nor had any notice of them.

By a supplementary certificate (1) of the arbitrator who stated the case, it appeared that the mining operations which caused the subsidence ceased in September, 1845; that Jamieson, before the sale to him, had notice and knowledge of them, and was shewn and went into the workings where they had been carried on under the land conveyed to him, and knew that they had been carried on by Smith and Sharp; but did not know anything as to the right of Smith and Sharp to carry them on, or of their title to the coal removed by them, or of the lease to them; and that the plaintiff heard of these mining operations and of the lease to Smith and Sharp for the first time after the subsidence.

It further appeared that the price given by Jamieson for the land sold to him, which was one-seventh of an acre, was 12*l.*, which would have been an inadequate price if the coal under the land had been unworked and had been included in the purchase.

Also that a portion of the walls and pillars of coal still remained under the plaintiff's land.

It also appeared that by the mortgage of the 4th of April, 1845, the defendant covenanted with Pearson, his executors, ad-

(1) Made after the argument. See post, p. 106.

ministrators, and assigns, for quiet enjoyment, freedom from incumbrances, and further assurance.

The pleadings were as follows :—

Declaration stating the covenant contained in the deed of October 27, 1845 (set out ante, pp. 100, 101), and alleging as breaches, first, that neither the defendant nor Pearson had, notwithstanding any act, deed, matter, or thing done or permitted by the defendant or Pearson to the contrary, good right to grant release or convey the said hereditaments in manner aforesaid conveyed with the appurtenances; but, on the contrary, John Joseph Smith and John Sharp, who, at the date of the deed of the 27th of October, 1845, and thence continually until the doing of what is hereinafter mentioned, by reason of acts, matters, and things done and permitted by the defendant, had lawful right and title to do what is hereinafter alleged to have been done by them, and having such lawful right and title as aforesaid, afterwards, and *whilst the plaintiff remained and continued seised* of the said two pieces of ground so conveyed to him as aforesaid, entered upon the same, and the seams of coal within and under the same, and worked and got and carried away the said coal, whereby the plaintiff lost the said coal so worked, won and gotten, and the surface of the said two pieces of ground subsided with the houses then built thereon, and the land and houses were damaged, &c.

Second breach: That the plaintiff had not enjoyed the said hereditaments without interruption from the defendant or persons claiming through him, alleging a demise by the defendant, before the execution of the deed of October 27, 1845, to Smith and Sharp of all the veins and seams of coal within and under the said two pieces of ground, with power to enter and dig, &c., for an "interest and tenancy" which at the time of the execution of the said deed and of the doing by them of the acts thereafter mentioned had not expired, alleging an entry upon the said seams of coal, and a working, getting, and carrying away of the coal, *whilst the plaintiff was seised*, whereby the plaintiff lost the coal, and the land subsided, &c.

Third breach: That the plaintiff had not enjoyed, &c., alleging that, *whilst the plaintiff was seised*, the defendant and his servants, and other persons claiming through the defendant, entered on the

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seams of coal and also certain clay within and under the said two pieces of ground, and worked, gôt, and carried away the coal and clay, whereby the plaintiff lost the coal and clay, and the land subsided, &c.

[The fourth and fifth breaches complained of disturbance to the plaintiff's enjoyment by the removal of support to plaintiff's land from adjacent lands, by reason of workings of the defendant and persons claiming through him, whereby, &c. There was no finding applicable to these breaches, and they became immaterial.]

Sixth breach: alleging notice to the defendant of the breaches secondly and fourthly assigned, and refusal by him to indemnify plaintiff.

Second count: Repeating the breaches alleged in the first count, with an allegation that defendant knowingly sold and conveyed, and procured to be conveyed, the land for the purpose of houses and buildings being erected thereon.

Plea 1. Non est factum. 2. Denial of breaches. 3. To both counts, so far as relates to the first breach, that Smith and Sharp had not by reason of any act, matter, or thing done or permitted by the defendant, lawful right or title to do what is alleged to have been done by them. 4. To both counts, so far as relates to the second breach, that defendant did not demise to Smith and Sharp as alleged. [5. This plea was to the fourth breach, and is therefore immaterial.] 6. That the supposed causes of action did not, nor did any of them, accrue within twenty years before suit.

Issue on all the pleas, and demurrer to the third plea, and joinder in demurrer.

The question for the opinion of the Court was, whether, on the facts in the case, the plaintiff was entitled to maintain this action in respect of all or any of the causes of action alleged in the declaration?

The case was argued in Trinity Term, 1871, by *Heath* (*Manisty, Q.C.*, with him), for the plaintiff, and by *Quain, Q.C.* (*Kemplay*, with him), for the defendant; and was again argued in Michaelmas Term, 1871, by *Heath*, for the plaintiff, and by *Kemplay*, for the defendant.

For the plaintiff, it was contended that the lease of the 23rd of July, 1844, was an incumbrance created by the defendant, the

validity of which he could not dispute: Jenkins' Century, p. 255, 6th Century, case 46; *Holmes v. Powell* (1); that its existence constituted a breach of the covenant for title: *Levett v. Withrington* (2); and also a breach of the covenant for quiet enjoyment, even though nothing were actually done under it in the plaintiff's time, for coal still remained to be worked, and there was power to exercise other rights over the land; that the unlawful act of Smith and Sharp in taking the fire-clay was an active disturbance within the meaning of the covenant, since it was facilitated by their lawful right of entering into the mine, and that at least their taking of the fragments of coal was so, inasmuch as that taking was authorized by the lease: *Morris v. Edgington* (3); *Andrews v. Paradise* (4); *Shaw v. Stenton* (5); that the Statute of Limitations (3 & 4 Wm. 4, c. 42, s. 3) did not apply; nor to the covenant for title, because the existence of the lease was a continuing breach: *Kingdon v. Nottle* (6); *King v. Jones* (7); nor to the covenant for quiet enjoyment, because even if the existence of the incumbrance was not a breach, a breach was committed by the acts done since the 6th of July, 1847, and therefore within twenty years of the writ; nor to the damage caused by the subsidence, because the cause of action did not arise until the subsidence: *Bonomi v. Backhouse* (8); per Willes, J., in the Exchequer Chamber (9); nor to the covenant for indemnity, because the breach did not arise till the refusal to indemnify: *Collinge v. Heywood* (10); *Reynolds v. Doyle*. (11)

For the defendant it was contended that the benefit of the covenant did not pass to the plaintiff, who took under Jamieson's power of appointment: *Roach v. Wadham*. (12)

[THE COURT pointed out that in the present case the use was derived out of the seisin of Jamieson, the covenantee, and that *Roach v. Wadham* (12) therefore did not apply.]

Further, that there was no breach of any of the covenants, the

(1) 8 D. M. & G. 572.

(2) 1 Lutw. 317.

(3) 3 Taunt. 24.

(4) 8 Mod. 318.

(5) 2 H. & N. 858; 27 L. J. (Ex.) 253.

(6) 4 M. & S. 53.

(7) 5 Taunt. 418; 4 M. & S. 188.

(8) 9 H. L. C. 503.

(9) E. B. & E. at p. 654; 28 L. J. (Q.B.) 378.

(10) 9 Ad. & E. 633.

(11) 1 Man. & G. 753.

(12) 6 East, 289.

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making of the lease being the act not of the defendant, but of Granger; that if the existence of the lease was a breach of the covenant for title, the breach was committed at the date of the covenant—the lease being already in existence—and was barred by the statute; that there was no such breach of the covenant for quiet enjoyment as was alleged, the entry and the removal of the coal which caused the subsidence having taken place before and not after the plaintiff was seised, so that there was a fatal variance between the breach alleged and the evidence; but that the evidence shewed, in fact, no breach of the covenant at all, the subsistence of the lease not being such, and there having been no disturbance in the plaintiff's time; that if there had been any disturbance on which the plaintiff could have sued, the action was barred by the statute; that as to the fire-clay and the small pieces of coal taken away within the period of twenty years, the taking of the fire-clay was a mere trespass not authorized by the lease, and neither that nor the taking of the small pieces of coal could be included in the allegation of the breach according to its true construction, for that the allegation plainly referred to the taking which followed immediately on the entry under the lease, and which alone caused the subsidence; that the subsidence was the damage really sued for, as appeared from the plaintiff's request for indemnity, which extended to nothing else; that *Bonomi v. Backhouse* (1) had no application; for that the minerals, the taking of which there caused the subsidence, were not, as here, in the plaintiff's land, but were under contiguous land, and the ground of decision was that the taking of them was lawful at the time it was done, and gave by itself no cause of action: the only cause of action was the subsequent damage; here the working, if subsequent to the purchase, would have been clearly a breach, and if once sued upon, there could have been no second action: *Nicklin v. Williams* (2); that, lastly, there was no breach of the covenant to indemnify, there being nothing in respect of which the defendant was bound to indemnify the plaintiff.

The case again stood over for the purpose of the arbitrator stating additional facts, in pursuance of which he made his supplementary certificate stated above (3); but no further argument took place.

(1) 9 H. L. C. 503.

(2) 10 Ex. 259; 23 L. J. (Ex.) 335.

(3) Ante, p. 102.

Jan 31, 1874. The following judgments were delivered:—

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CLEASBY, B. The question in this case is, whether the defendant is liable to the plaintiff upon a covenant given by the defendant to one Jamieson and his appointee, for title, for quiet enjoyment, and for indemnity.

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The plaintiff had bought two pieces of land of one Jamieson in 1846. Jamieson had bought the land of the defendant, and the defendant had entered into the usual covenants for title and quiet enjoyment, and there was also a covenant to indemnify. The plaintiff sued the defendant upon these covenants, and we disposed in the course of the argument of the objection that the plaintiff could not sue on these covenants by reason of his only being an appointee of Jamieson and not an assignee, holding that in this case the plaintiff could sue upon the covenant, if there was a breach of which he could take advantage.

The declaration sets forth a good cause of action. It alleges that the plaintiff became the purchaser of certain land (which would, of course, include any coal or other mineral underneath it), and that the defendant had made covenants with the plaintiff's vendor and appointor for title and quiet enjoyment, and to indemnify from certain damages; and it further alleges that, after the plaintiff purchased, certain persons, lawfully entitled under a lease derived from the defendant, entered upon the mines and worked them, and took the plaintiff's coal, and that by reason of the coal being so taken and removed, the land of the plaintiff subsided, and a house built upon it was greatly damaged.

But the facts, as found by the arbitrator, in my opinion, entirely displace this cause of action. It appears that all the coal under the plaintiff's land had been worked out before Jamieson sold to the plaintiff, and not only before Jamieson sold, but before he bought, and before the covenant sued on was entered into. It also appears that Jamieson, when he bought, had been through the workings, and knew the coal had been all worked out.

The plaintiff bought of Jamieson the land and all his right, title, and interest in it; he therefore never purchased any of the coal, but only the land without the coal, and the covenants apply only to what was the subject-matter of purchase, and therefore



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there is no breach of covenant for title by reason that the coal had been removed.

Nor is there any breach of the covenant for quiet enjoyment by reason of the taking the coals at the time when they were taken. And it also seems to me impossible to say that there is a breach of covenant for quiet enjoyment by reason of the subsidence of the house in consequence of the previous removal of the coal. This subsidence of the house is a necessary consequence of the condition of the property bought by the plaintiff, and may have been partly caused by the additional pressure caused by building on the ground. It is not any interference by any person with the plaintiff's enjoyment, nor the consequence of any such interference.

Nor is there any breach of the covenant to indemnify, because there is no damage to the plaintiff's interest in the land caused by any estate existing in the land at the time of the purchase. This is not an action for wrongfully depriving the plaintiff's land of the support of the subjacent minerals. If it were, questions of law might arise, as to which the case of *Bonomi v. Backhouse* (1), referred to upon the argument of this case, might be an important authority; but it has no bearing upon the case as it stands. Questions of fact would also arise, which the case leaves undecided: for example, whether the removal of the support can be said to be the act of the defendant, who only signed the agreement for Granger.

There are counts connected with the working of the adjoining mine; but these, it was admitted, are out of the case. The subsidence was caused wholly by the coal being removed under the plaintiff's land. It was contended that the subsistence of the lease, or, more properly speaking, the fact that the twenty-one years mentioned in the agreement had not expired, made the agreement of itself an incumbrance, and that the plaintiffs are entitled, at all events, to nominal damages. Independent of the objection of the variance between the statement of the breach and the proof, I cannot think that, if such a lease or agreement was at an end so far as regards the coals under the plaintiff's land,

(1) 9 H. L. C. 503.

it can make any difference that under the same document the lessees are winning coal under different land. It might be a mile off; and how can the accidental circumstance of all the coal under the distant land being worked out or not being worked out determine whether the plaintiff has a cause of action? It is true the agreement gives the lessees the privilege of doing certain things upon the surface necessary for the working the colliery; and if it appeared that any such thing was or could be necessary to be done upon the land of the plaintiff, there might be some ground for regarding the pendency of the agreement as an incumbrance.

The same remark applies to anything which the lessees were authorized to do underground besides taking the coal. The seam of coal, and not the space occupied by the coal, forms the subject-matter of the agreement, and although, as long as any portions of the seams of coal are unworked, the agreement or lease is, properly speaking, subsisting, yet, in the absence of any such statement as I have mentioned, it certainly appears to me that it would be an unreasonable conclusion that it subsisted as to the plaintiff's land in any sense to make it an incumbrance upon it, in respect of which even nominal damages could, upon the facts stated, be recovered. As to the taking of fire-clay in 1848, in my opinion it was unlawful, and could not be regarded as a breach of the covenant for quiet enjoyment.

And there was no damage caused by it so as to make it the subject of the covenant to indemnify. In reality, if fire-clay worth working had been found (as the lease already granted was only a lease of the coal mine) it would have been an addition to the value of the plaintiff's property, as a fresh lease from him would have been required to work it. If the existence of the lease could (contrary to my opinion already expressed) be regarded as a breach of the covenant for title, by reason of its being an incumbrance which diminished the value of the property, then this breach was completed in Jamieson's time. A man must be taken to know what the property is which he buys, unless some deception is practised upon him, for which there is no pretence. The condition of the land must have been known, and the cause of action, if any, in respect of this supposed diminution of value complete in Jamieson, and the plaintiff cannot enforce it. It should be observed

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that the claim is not upon the breach of a covenant for further assurance, as to which the cause of action would arise when the further assurance lawfully demanded was refused.

In my opinion there is no foundation for this action. I think the plaintiff bought a piece of land, the coal having been previously taken from underneath it. He took no covenant to protect him against its subsiding, and therefore must bear the consequence; such a covenant would probably have enhanced the price he had to pay.

BRAMWELL, B. I entirely concur in the judgment of my Brother Cleasby, but wish to add what follows.

There is a variance between the declaration and proof as to the breach of the covenant for quiet enjoyment. That breach is that the plaintiff has not enjoyed, and, on the contrary, Smith and Sharp, to whom defendant had demised, after the conveyance to the plaintiff, rightfully entered and took the coal. This is untrue. The defendant did not demise to Smith and Sharp, and they did not enter and take coal after the conveyance to the plaintiff. I think this variance ought not to be amended. If the facts were truly stated, the plaintiff would at the utmost only be entitled to nominal damages on this breach, supposing the taking of the few loose pieces of coal were a breach. The arbitrator offered to amend on terms which the plaintiff refused; and now, after all the expense and trouble of the cause, he asks, on the hearing of the argument, for amendment. I think we ought in our discretion to refuse it.

I think there is no variance as to the breach of covenant for title. The breach is that the Defendant had not title when he entered into the covenant; the incorrect statement is in the alleged consequence, in the *per quod*, viz. that Smith and Sharp entered and took coal while the plaintiff was the owner. This is an allegation of special damage resulting from the breach, which, being untruly stated, the plaintiff could not prove; the breach, however, remains, and is correctly stated. But assuming the breach to be correctly stated and proved, I am of opinion that the Statute of Limitations is a bar to it. It was completed, if it ever existed, at the time the deed was executed. If Jamieson had

recovered on it, or released it, no further action on it could have been maintained by him, nor, consequently, by his assignee. It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken indeed, but broken once for all. In the case of a covenant to repair, the breach is continuing, because the covenant is broken afresh every day the premises are out of repair, and when an action is brought for breach of such a covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues. Nothing like that exists as to this covenant. If the words of the breach are looked at, it will be seen that they are, that neither the defendant nor Pearson had good title, but, on the contrary (and this is the breach), Smith and Sharp at the time of making the deed, and thence continually had title, &c. It is true that the Court in *Kingdon v. Nottle* (1) speak of the breach as a continuing breach. Oddly enough, the breach assigned there is express, that the defendant at the time of the execution of the indenture was not seised, &c. But the Court having in the previous case of *Kingdon v. Nottle* (2) held that the executor could not maintain an action on this covenant, now held that the real representative could, and it is in reference to this that they use the language I mention.

*Boncmi v. Backhouse* (3) has, in my judgment, no bearing on this case. I can claim to be well acquainted with the ratio decidendi of that case in the Exchequer Chamber. It was an action of tort. There was neither damnum nor injuria till the plaintiff's land was affected. The excavations were not tortious at the time they were made, and never would have become so had those who made them prevented their consequences reaching the plaintiff's land.

Of course the Statute of Limitations would apply to any breach of covenant for quiet enjoyment which took place twenty years before suit.

The sixth breach and the last count follow the fate of the second breach. Moreover, no damnification from the breach alleged is shewn.

For these additional reasons, as well as for those given by

(1) 4 M. & S. 53.

(2) 1 M. & S. 355.

(3) 9 H. L. C. 503.



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my brother Cleasby, I think our judgment should be for the defendant.

KELLY, C.B. Several questions arise in this case, of which the first in order appears to be, whether the grant of what has been termed the lease, or the agreement for a lease, by Mr. Granger to Smith and Sharp on the 23rd of July, 1844, was a breach of the covenant for title by the defendant upon which this action is founded. The words of this agreement reserving an annual rent of 50*l.*, commencing from the 1st of July then last past, make it to operate as a present demise, and it was so acted on by Smith and Sharp, who entered upon and began to work the mines shortly after the date of the grant. And this agreement, which I shall hereafter call the lease, continued in force for twenty-one years, that is to say, until the 1st of July, 1865. This instrument was signed by the defendant in these terms: "For T. C. Granger, William Green."

The first objection of the defendant is, that the granting of this lease (assuming that it constitutes an incumbrance on the land conveyed to Jamieson, and by him to the plaintiff, and in respect of which the covenant for title was entered into) was not the act of the defendant, but that of Granger alone. The position of the defendant in respect of the land was peculiar; for Granger, who was the real and beneficial owner, executed a conveyance of it to the defendant in 1842, purporting to be a deed of sale of the fee simple in consideration of the sum of 740*l.* But it was agreed between the defendant and Granger that the defendant should have no beneficial interest in the land, but that he should hold it for the benefit of Granger; and accordingly Granger appears to have treated the property as his own, and to have leased the mines to Smith and Sharp, in consideration of rents payable to himself to his own use. It might have been doubtful whether this act of Granger's would have been a breach of covenant by the defendant, but the words of the covenant being "notwithstanding any act, deed, matter, or thing done or permitted by him, the said W. Green," I think, looking to the interest he himself possessed, that by signing this instrument for Granger he permitted and sanctioned or affirmed the grant of the lease to Smith and Sharp

within the meaning of the covenant; and inasmuch as this lease continued in force until, and at, and long after the conveyance to Jamieson and to the plaintiff, and conferred a right upon Smith and Sharp to enter into and work the mines, which right they exercised, I am of opinion that it may be treated as a lease by the defendant himself, and that it constituted a breach of the covenant for title, and an incumbrance upon the land so conveyed, and did not cease so to operate until the expiration of the term in 1865.

The property had been mortgaged to one Boyd, in December, 1842, and the mortgage having been afterwards paid off, it was again mortgaged to George Pearson, who became a party to the conveyance to Jamieson, and in July and August, 1846, Jamieson conveyed by appointment to the plaintiff, who thereupon, as contended by him, became entitled to the benefit of the covenant as assignee. It was indeed objected by the defendant that the plaintiff, having taken the estate by way of appointment only, was not an assignee in law of the covenant, and for this the case of *Roach v. Wadham* (1) was cited; but we intimated in the course of the argument that, looking to the terms of the conveyance to Jamieson and the plaintiff respectively, that case was not applicable to the present, and that the benefit of the covenant passed to the plaintiff as assignee.

Smith and Sharp proceeded to work the mines, and continued their operations until the month of August, 1848, and on the 24th of December, 1865, the surface of the ground belonging to the plaintiff subsided, and several houses which had been built upon the land, and which were let at rents amounting to 130*l.* a year, were subverted and greatly damaged, and this action is brought to recover the amount of the damage sustained by the plaintiff. It appears, however, that the working of the mines which occasioned the subversion of the houses in 1865, was complete before July, 1846, when the plaintiff became the owner of the land. Certain other operations took place between July, 1846, and August, 1848, but these were substantially confined to the taking of fire-clay, to which Smith and Sharp were not entitled under the lease, and in respect of which, therefore, the defendant would incur no liability. But as late as 1848 the lessees also took away some small fragments

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(1) 6 East, 289.

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of coal, which had fallen from the sides or the walls of the mine, and for which, and for the entry into the mine, although the coal so taken was of no appreciable value, the plaintiff claims at least nominal damages.

Upon these facts five questions arise: 1. Is the plaintiff entitled to recover the amount of the damage arising from the subsidence, which has been caused by the working of the mines before he became entitled to the land? 2. Is he entitled to recover damages for the entering into the mines and the taking of the coal between August, 1846, and August, 1848, after his title to the land had commenced? 3. Is the Statute of Limitations a bar, the working of the mines which caused the subsidence having been complete before July, 1846, and before the plaintiff was possessed, and the action not having been commenced until the 6th of July, 1867? 4. The declaration alleging the working of the mines to have taken place while the plaintiff was the owner of the land, whereas the working which caused the subversion of the houses, as before observed, was complete before the date of his conveyance, the 23rd of August, 1846, is this a fatal variance as far as respects the damages claimed for the subversion of the houses? 5. Was the lease a continuing breach of covenant until its expiration on the 1st of July, 1865; and is the plaintiff therefore entitled at least to nominal damages by reason of the existence of the lease, or of the entry into the mine and the taking of fragments of coal in 1848, and so within the twenty years, under either the covenant for title or that for quiet enjoyment?

The first, third, and fourth questions, and the second and fifth, may be considered together. Upon the first, third, and fourth questions the plaintiff claims substantial damages by reason of the subsidence of his land and the falling of his houses, which took place in the year 1865, notwithstanding the fact found by the arbitrator that the working of the mines before the plaintiff's title to the land accrued in 1846 was the cause of the subsidence, and that such working of the mines was more than twenty years before the commencement of the suit. It is insisted, however, that the plaintiff is precluded even from raising this question by the terms of his declaration, which, in assigning the breach, expressly alleges that Smith and Sharp, "afterwards and whilst the plaintiff remained

and continued seised of the said two pieces of ground so conveyed to him as aforesaid, entered upon the mines and seams of coal within and under the plaintiff's ground, and worked, won, got, and carried away the said coal, whereby the plaintiff lost the said coal, and the surface of the said two pieces of ground subsided with the said houses then built thereon." This averment is that the working of the mines, the cause of the subversion of the houses, took place while the plaintiff was seised of the land, whereas the fact found by the arbitrator is that it was complete before the plaintiff became entitled to the land. And this, as setting forth the very cause of action of which the plaintiff complains, is a material variance, and fatal to this, the essential part of the plaintiff's claim. An application was made to us to amend the declaration by striking out the allegation that the working took place while the plaintiff was possessed; but it was stated by the counsel for the defendant and admitted that, upon a similar application during the arbitration, the defendant was willing to consent to an amendment upon payment by the plaintiff of the costs of the action and the arbitration theretofore incurred, and that this was refused by the plaintiff. Upon these grounds my learned Brethren are of opinion that we ought not now to allow the amendment. I must say that the refusal during the arbitration, and the mistake itself in the pleadings, being the acts of the legal advisers of the plaintiff, and not his own, I should have been disposed, upon payment by the plaintiff of all costs incurred up to the present time, even now to permit him to amend; but the majority of the Court being of a contrary opinion, the amendment cannot be made; and I concur with the rest of the Court in thinking that the variance is fatal. Although, therefore, I am of opinion, on the ground hereafter stated, that the plaintiff is entitled to judgment upon the breach of the covenants for title and for quiet enjoyment, with nominal damages, I agree that there must be judgment for the defendant in respect of all other damages claimed.

It is unnecessary, therefore, to pronounce an opinion on the chief question in the case; but, as a court of appeal may hold the variance immaterial, or may strike out the words which constitute the variance, I think it right to observe that, looking to the case of *Bonomi v. Backhouse*, in the Exchequer Chamber and the House

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of Lords (1), but especially to the judgment pronounced by Willes, J., in the Exchequer Chamber (2), I think that the true cause of action in this case is the subsidence of the land and the consequent destruction of the houses in 1865, and that therefore the Statute of Limitations is no bar; and that such subsidence and its results being caused by acts lawfully done by the lessees under the lease, which lease was a breach of the covenants by the defendant, he is responsible for the damage done, and, but for the variance, would be liable for that damage in this action.

Upon the second and fifth questions I am of opinion that this action is maintainable upon the covenant for title in respect of the existence of the lease until 1865, and upon the covenant for quiet enjoyment, by reason of the entering into the mine and taking away the fragments of coal between July, 1847, and August, 1848.

There is a distinction between the covenant for title and the covenant for quiet enjoyment. The covenant for title is broken by the existence of an adverse title in another, as in this case by the lease, its mere existence rendering the land of less value. The covenant for quiet enjoyment is broken only when the covenantee is disturbed, as in this case by the entry into the mine and the taking the fragments of coal in 1848. The deed of purchase having conveyed to Jamieson, and afterwards to the plaintiff, the mines under the land as well as the surface, the covenant of the defendant was that he had good title to the mines. That covenant, I think, was broken as soon as it was made, by reason of his having before become party to a lease of the mines, which lease was then in force. It was a covenant running with the land, and a continuing covenant, and the breach of it by means of the lease was a continuing breach; and although the plaintiff might have sued upon it upon his becoming possessed, and might have recovered the damages he had sustained (if any) by reason of the breach, he was not bound to do so; and I am of opinion that he continued entitled to sue for any damage afterwards sustained, whenever any such should have resulted from the breach; and, finally, that if the Statute of Limitations apply at all to covenants for title, the time of limitation does not necessarily begin to run from the making of the covenant, or of a lease which is a breach of the covenant, and

(1) 9 H. L. C. 503.

(2) E. B. & E. at p. 654; 28 L. J. (Q.B.) 378.

that it is no bar as long as the lease continues, and any damage, nominal or substantial, is or may be sustained. I do not understand it to be questioned that the conveyance passed the mines as well as the land to the plaintiff, nor that a covenant for title runs with the land, nor therefore that the plaintiff is entitled to the benefit of this covenant, nor that it was broken by the making of the lease. And I am of opinion that he is entitled to sue upon it now, upon the ground that the existence of the lease, until it expired in 1865, was an incumbrance upon the land, and rendered it of less value than if it had not existed; and further, that it made the entry of the lessees lawful, and so enabled them to take the fire-clay from the mine, and although they themselves, and not the defendant, are liable to the plaintiff for the value of the fire-clay taken, it is a damage to the plaintiff that he is put to his action against them, and may incur extra costs in such action, which he could not have been exposed to but for the right of entry conferred upon them by the defendant. I am also of opinion that the entry into the mine and the taking the fragments of coal in 1848 by virtue of the lease, which was within the twenty years, was a breach of the covenant for quiet enjoyment.

The case of *Kingdon v. Nottle* (1), upon a covenant for title, and *King v. Jones* (2), upon a covenant for further assurance, are authorities to shew that these covenants are continuing covenants, and the breaches of them continuing breaches, and that a right of action accrues toties quoties when and as often as damage actually arises from the breach of either covenant. *Kingdon v. Nottle* (3) was the case of a mortgage in fee, and the mortgagor covenanted with the mortgagee and his heirs and assigns that he had good title to convey and was seised in fee. The mortgagee held during his life, and brought no action; after his death his executrix sued upon the covenant for title, and the further covenant for further assurance, assigning for breaches that defendant had no title, and that plaintiff requested him to levy a fine, which he refused. She failed, on the ground that the covenant ran with the land and had passed to the devisee of the covenantee. But in the following year the second case (4) was decided in an action brought by the

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(1) 1 M. &amp; S. 355; 4 M. &amp; S. 53.

(3) 1 M. &amp; S. 355.

(2) 5 Taunt. 418; 1 M. &amp; S. 188.

(4) 4 M. &amp; S. 53.

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same person, as devisee of the original covenantee, suing as assignee of the covenant, and assigning for breach that the defendant had no title, and for damage, that the lands were of less value than if there had been a good title, and that she had been prevented from selling them for so large a price as she would have otherwise obtained. There it was argued that, the breach having been in the testator's lifetime, it could not be assigned; that the covenant might pass with the land, but not so the breach, for which the testator and he alone could sue. But it was held that there was a breach also in the time of the devisee, which gave her a right of action upon which she was entitled to sue: Lord Ellenborough observing (1), "The covenant passes with the land to the devisee, and has been broken in the lifetime of the devisee; for so long as the defendant has not a good title there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which not being done the covenant is broken once for all, but is in the nature of a covenant to do a thing toties quoties, as the exigency of the case may require." Here, then, the damage, that the plaintiff was unable to sell at as large a price as she would have obtained if the title had been good, was held to constitute a continuing substantive cause of action, and if the action had been brought at a long subsequent period, and the Statute of Limitations had been pleaded, the time could not have run from any earlier period than the accruing of that action.

And so in *King v. Jones* (2), where the covenant was for further assurance, the covenantee in his lifetime called upon the covenantor to levy a fine, and afterwards died, and the plaintiff, his heir, to whom the covenant had passed as assignee, entered upon the premises and was possessed, and was afterwards evicted and brought his action, it was objected that the breach was in the lifetime of the original covenantee, and that he alone was entitled to sue, and that if any action lay after his death it must be by his executors, as the damages belonged to his estate. But, after an elaborate argument and time taken to consider, it was held by the Court of Common Pleas that the action well lay, and that the refusal to levy a fine (the further assurance required) was a breach and a damage to him; that "the ancestor (the original covenantee)

(1) 4 M. & S. at p. 57.

(2) 5 Taunt. 418; 4 M. & S. 188.

had required the defendant to perform his covenant, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise in him so to do, until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir, who represents the ancestor as to the land, as the executor in respect of personalty." These decisions shew that it is the resulting damage, and not merely the breach of covenant, which gives the right of action.

It is true when these cases were decided there was no statute of limitations expressly taking away the right to sue upon a covenant after a certain number of years from the breach. But the language of the statute is, that no action shall be brought but within twenty years after the action has accrued; and we have only to consider the real nature of the covenant for title, and of the various kinds of breaches of it which may be committed, to see that the Statute of Limitations is wholly inapplicable to such breaches, except where the right of action is upon an eviction of the whole property conveyed, so that there is no land with which the covenant may run, and nothing left upon which the covenant can operate.

In such a case the statute may apply, and from such an eviction the time may begin to run. But in the cases cited, as here, the breach being the grant and continued existence of a lease of a part of the property only, as of the mines and minerals under the land, how can the statute apply? The mine may never be worked at all, so that no damage may ever be sustained; and if an action be brought upon the grant of the lease, only nominal damages may be recovered. But the lease may be for forty years; a quantity of minerals may be taken at the end of ten years, a number of houses on the surface subverted and destroyed in twenty years, and a mansion injured in thirty years.

If these be not separate and substantive causes of action, upon each of which the complainant has at least twenty years to sue, of what use is the covenant in such a case? But suppose another case, covenant for title in a conveyance in fee of a landed estate. It turns out that the covenantor, a year or two before, has sold and conveyed the reversion of one-half of the property at his

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death to A. B., provided A. B. is then living. The covenantor lives for twenty years, and then dies, and A. B. survives him and enters. Upon these facts I apprehend it is not to be doubted that the covenant is broken as soon as it is made; for if the purchaser, the covenantee, were minded to sell the property, or he became bankrupt, and it was of necessity to be sold, it would sell for much less than if there were an indefeasible title in fee simple. But supposing no action to be brought until the death of the covenantor and the entry of A. B., can it be contended that the Statute of Limitations would be a bar? If it be, and the covenantee was ignorant of the conveyance until the death of the covenantor, he loses half his land and has no remedy. And if he hears of it and sues within the twenty years, but in the covenantor's lifetime, how can the jury estimate the damages, in the uncertainty whether the covenantor may not survive A. B., and so that the covenantee will never be disturbed in his title?

I apprehend, therefore, that upon these grounds, and upon all the authorities, the lease in question was a continuing breach of covenant, and that the plaintiff was entitled to his action at any time within twenty years of any damage, whether nominal or substantial, being sustained, by entry into the mine or otherwise, as long as the lease was in force, and consequently from the entry into the mine in 1848, and the taking of the fragments of coal; and further, that the action lies by reason of the mere existence of the lease, which, as conferring a right to enter into the mine and upon the surface, affected more or less the value of the property until it expired by effluxion of time in 1865. I think, therefore, that judgment should be entered for the plaintiff with nominal damages.

*Judgment for the defendant.*

Attorney for plaintiff: *E. H. De Rhe Philipe, for Brignall, Durham.*

Attorneys for defendant: *S. R. Hoyle, for Thompson & Lisle, Durham.*

## CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXVII VICTORIA.

SMITH v. SMITH.

*Judgment—Execution—Reasonable Time.*

1874

*April 15.*

A party who has signed judgment is entitled to issue execution without waiting for a return of post.

*Semble*, he is entitled to issue execution immediately, and is not bound to wait a reasonable time.

A VERDICT in this action (which was an action for negligence) having been found for the plaintiff on the 12th of November, 1873, judgment was signed on the postea on the 27th of November, and on the 29th of November, at 11.30 a.m., the taxation of costs (which was attended by the clerks of the respective attorneys) was completed, and the master's allocatur obtained. The clerk to the plaintiff's attorney immediately asked for a cheque in payment, but the clerk to the defendant's attorney was not ready at that moment to pay, and asked for a return of post. (1) The

(1) This was the view taken by the Court of the evidence on affidavit, which was conflicting.

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clerk to the plaintiff's attorney thereupon immediately issued a writ of fi. fa. for damages and costs, and handed it to the sheriff's officer, who, in the course of the day, levied under it. This appeared to be done by way of retaliation for an advantage taken, on the other side, of a technical defect in an affidavit, which had caused an adjournment and delay of the taxation.

On the 1st of December an order was made by the master, on a summons taken out by the defendant, setting aside the writ of fi. fa. and all subsequent proceedings, upon terms, with costs against the plaintiff, which the defendant was to be entitled to deduct from the amount due on the judgment. An appeal against this order was dismissed by Grove, J., with costs, under the belief that the order was made by consent.

The defendant afterwards paid the amount of the judgment, after deducting these costs, which amounted to 19*l.* 7*s.* 1*d.*

Thereupon the plaintiff obtained a rule calling on the defendant to shew cause why the order of the master and of Grove, J., should not be rescinded, and why the defendant should not pay to the plaintiff the balance of 19*l.* 7*s.* 1*d.* and the costs of the execution and levy.

*Willis and R. V. Williams* shewed cause. The order was made by consent.

[THE COURT was of opinion on the evidence, and on the statement of the master, that it was not so made.]

The order was rightly made. The execution was issued with undue speed.

[BRAMWELL, B. That would not make it irregular, though it might be a ground for staying the sale under it.]

*Perkins v. National Assurance and Investment Association* (1) is an authority that execution cannot be issued immediately on signing judgment; there must be a default.

[BRAMWELL, B. That was a case on a judge's order, which required that a default should be made. Where there is a judgment you may issue execution, not because there is a default, but because the debt is due as soon as judgment is signed.]

Nevertheless, the party obtaining the judgment must wait a

reasonable time; the observations of Bramwell, B., in the case cited (1) shew the inconvenience and injustice which a contrary rule would produce. To issue execution suddenly where no special circumstances justify it amounts to an abuse of process which the Court will restrain. It is not pretended that any such circumstances existed here; the execution, therefore, was not issued bonâ fide for the purpose of getting the debt paid, but merely for the purpose of vexation and annoyance; and that is the proper description of abuse of process. [They cited *Grainger v. Hill* (2), *Heywood v. Collinge* (3), and a case of *Day v. South Eastern Ry. Co.*, at Chambers, where Willes, J., made a similar order against a plaintiff who had issued immediate execution, and levied in the board-room of the company.]

[BRAMWELL, B. The only alternative given to the plaintiff here was to wait a return of post; he was clearly not bound to wait so long.]

*Lucius Kelly*, in support of the rule, referred to Chitty's Practice, vol. i. p. 593 (12th ed.), and to the Common Law Procedure Act, 1852, s. 206.

[He was stopped.]

BRAMWELL, B. This rule must be made absolute. In so deciding we do not overrule the decision of Grove, J., except upon the point of whether the order made by the master was made by consent. That order, we think, was wrong. It is the inclination of my opinion, that a person who has signed judgment may immediately issue execution. This may sometimes lead to unreasonable consequences, because, as I pointed out in *Perkins v. National Assurance and Investment Association* (4), there may be no authority in the clerk who attends the taxation to receive the money, and so the defendant cannot possibly prevent the execution from issuing if the attorney for the plaintiff so far forgets himself as to issue it without giving any time to the defendant to tender the amount. If it were necessary to decide this, I should so hold, though before doing so I should like to know the particulars of the

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(1) 2 H. & N., at p. 72.

(2) 4 Bing. N. C. 212.

(3) 9 A. & E. 268.

(4) 2 H. & N. at p. 72; 26 L. J.

(Ex.) 182.



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case at Chambers referred to by Mr. Willis. But it is not necessary to examine that case further, for, after all, it only decides that a reasonable time must be allowed, though what time, and what is the criterion of reasonableness, I am at a loss to know. Perhaps it might be said, so much time as would allow of the clerk communicating with his principal; but I think there is no such rule; it cannot depend on the distance of his place of business from the taxing-office. This is one of those things which is ordinarily regulated by good feeling. I do not remember ever to have known such a case before; which goes far to shew that it is not necessary to lay down a rule.

Here, however, that question does not arise, because the defendant's attorney asked the plaintiff's attorney to wait for a return of post. If he had said, "I insist upon time to go to my employer," it would have been different; but the plaintiff's attorney was not bound to accept the only alternative that was offered him. If the question was between waiting a return of post and issuing execution instanter, he had a right to do it instanter. If such a thing were done without reasonable cause it would be a most unbecoming thing, and would deserve great censure; here, however, a provocation had been given, which may furnish some excuse, though it would have been better not to have acted upon the provocation.

PIGOTT, B. I quite agree with what my Brother Bramwell has said, and with the reasons he has given. I agree with the decision in *Perkins v. National Assurance and Investment Association* (1), but this case is not within it. The plaintiff was acting in his strict right; whether altogether with propriety we need not determine.

*Rule absolute.*

Attorney for plaintiff: *Berridge.*

Attorneys for defendant: *Few & Co.*

(1) 2 H. & N. 71; 26 L. J. (Ex.) 182.

## GORRIS AND ANOTHER v. SCOTT.

1874

*Statutory Duty—Contagious Diseases (Animals) Act, 1869.**April 22.*

When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.

The defendant, a shipowner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75 :—

*Held*, that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiffs could not recover.

DECLARATION, first count: that after the passing of the Contagious Diseases (Animals) Act, 1869, the Privy Council, in exercise of the powers and authorities vested in them by the Act (s. 75), made an order (called the Animals Order of 1871) with reference to animals brought by sea to ports in Great Britain, and to the places used and occupied by such animals on board any vessel in which the same should be so brought to such ports; and thereby, amongst other things, ordered (1) that every such place should be divided into pens by substantial divisions; (2) that each such pen should not exceed nine feet in breadth and fifteen feet in length; that afterwards and whilst the order was in force the plaintiffs delivered on board a vessel called the *Hastings*, to the defendant as owner of the vessel, certain sheep of the plaintiffs', to be carried by the defendant for reward on board the said vessel from Hamburg to Newcastle, and there delivered to the plaintiffs; and the defendant, as such owner, received and started on the said voyage with the sheep for the purposes and on the terms aforesaid; that all conditions were fulfilled, &c., yet the place in and on board the said vessel which was used and occupied by the sheep during the voyage was not, during the said voyage or any part thereof, divided into pens by substantial or other divisions, by reason whereof divers of the sheep were washed and

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swept away by the sea from off the said ship, and were drowned and wholly lost to the plaintiffs.

Second count, similar to the first, but setting out a third regulation: "that the floor of each such pen should have proper battens or other foot-hold thereon," and alleging the loss of the sheep as aforesaid to have been caused by the want of such battens.

Demurrer and joinder.

*Shield*, in support of the demurrer. The statute was made for the furtherance of a public purpose, and not to secure any private benefit, and the observance of its provisions is enforced by a penalty: 32 & 33 Vict. c. 70, s. 103, and *Cullen v. Trimble*. (1) Its infringement, therefore, gives no ground for an action.

The preamble of the Act, as well as its whole structure, and s. 75 in particular, under which this order is made (2), shew that the Act is entirely directed to the prevention of contagious

(1) Law Rep. 7 Q. B. 416.

(2) 32 & 33 Vict. c. 70: "Whereas it is expedient to confer on Her Majesty's most honourable Privy Council powers to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, and other animals, by prohibiting or regulating the importation of foreign animals; and it is further expedient to provide against the spreading of such diseases in Great Britain, and to consolidate and make perpetual the Acts relating thereto, and to make such other provisions as are contained in this Act." Part I. (ss. 1-8) is headed "Preliminary;" part II. (ss. 9-14), "Local Authorities;" part III. (ss. 15-30), "Foreign Animals;" part IV. (ss. 31-64), "Discovery and Prevention of Disease;" part V. (ss. 66-74), "Slaughter in Cattle Plague; Compensation;" part VI. (ss. 75-85), "Orders of Council

and Local Authorities;" and the rest of the Act relates to the taking of lands, to expenses, and to offences and penalties.

Sect. 75: "The Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes:—

"For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing:

"For protecting such animals from unnecessary suffering during the passage and on landing:

[Then follow certain inland purposes.]

"And generally any orders whatsoever which they think it expedient to make for the better execution of this Act, or for the purpose of in any manner preventing the introduction or spreading of contagious or infectious disease among animals in Great Britain."

diseases among cattle; and if, under s. 75, the Privy Council had made orders directed to some other purpose, they would have exceeded their powers. The order, then, must be construed with reference to the language of s. 75 and the purpose of the Act, and, so understood, its object is not to secure the owners of sheep and cattle from loss by the perils of the sea, but to protect the country against the introduction and the spread of murrain. This circumstance brings the case within the authority of *Stevens v. Jeacocke* (1), and distinguishes it from *Couch v. Steel* (2) and *Atkinson v. Newcastle and Gateshead Waterworks Co.* (3)

*Herschell, Q.C.* (*J. W. Mellor* with him), *contra*. *Stevens v. Jeacocke* (1) is distinguishable on the ground that a specific remedy was given by the statute; the present case falls within *Atkinson v. Newcastle and Gateshead Waterworks Co.* (3), where it was held that the imposition of a penalty which was not intended as a compensation did not exclude the right of action. These precautions must be considered as enacted generally, at least to this extent, that all persons engaged in the importation of animals must be taken to know of the existence of the regulations, and to contract with reference to them. The plaintiffs were entitled to assume that the defendant would perform all the duties cast upon him by the law, including compliance with these orders; and that being so, the defendant has impliedly contracted with the plaintiffs that he would perform them.

**KELLY, C.B.** This is an action to recover damages for the loss of a number of sheep which the defendant, a shipowner, had contracted to carry, and which were washed overboard and lost by reason (as we must take it to be truly alleged) of the neglect to comply with a certain order made by the Privy Council, in pursuance of the Contagious Diseases (Animals) Act, 1869. The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. Under the authority of that Act, certain orders were made; amongst others,

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(1) 11 Q. B. 731; 17 L. J. (Q.B.) 163.

(2) 3 E. &amp; B. 402; 23 L. J. (Q. B.) 121.

(3) Law Rep. 6 Ex. 404.



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an order by which any ship bringing sheep or cattle from any foreign port to ports in Great Britain is to have the place occupied by such animals divided into pens of certain dimensions, and the floor of such pens furnished with battens or foot-holds. The object of this order is to prevent animals from being overcrowded, and so brought into a condition in which the disease guarded against would be likely to be developed. This regulation has been neglected, and the question is, whether the loss, which we must assume to have been caused by that neglect, entitles the plaintiffs to maintain an action.

The argument of the defendant is, that the Act has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued; that although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; but that if the object is not to protect individuals against the consequences which have in fact ensued, it is otherwise; that if, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but that when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect. The principle may be well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against

the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description. And if we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. The preamble recites that "it is expedient to confer on Her Majesty's most honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals, by prohibiting or regulating the importation of foreign animals," and also to provide against the "spreading" of such diseases in Great Britain. Then follow numerous sections directed entirely to this object. Then comes s. 75, which enacts that "the Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes." What, then, are these purposes? They are "for securing for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing," "for protecting such animals from unnecessary suffering during the passage and on landing," and so forth; all the purposes enumerated being calculated and directed to the prevention of disease, and none of them having any relation whatever to the danger of loss by the perils of the sea. That being so, if by reason of the default in question the plaintiffs' sheep had been overcrowded, or had been caused unnecessary suffering, and so had arrived in this country in a state of disease, I do not say that they might not have maintained this action. But the damage complained of here is something totally apart from the object of the Act of

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Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

PIGOTT, B. For the reasons which have been so exhaustively stated by the Lord Chief Baron, I am of opinion that the declaration shews no cause of action. It is necessary to see what was the object of the legislature in this enactment, and it is set forth clearly in the preamble as being "to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals," and the "spread of such diseases in Great Britain." The purposes enumerated in s. 75 are in harmony with this preamble, and it is in furtherance of that section that the order in question was made. The object, then, of the regulations which have been broken was, not to prevent cattle from being washed overboard, but to protect them against contagious disease. The legislature never contemplated altering the relations between the owners and carriers of cattle, except for the purposes pointed out in the Act; and if the Privy Council had gone out of their way and made provisions to prevent cattle from being washed overboard, their act would have been *ultrà vires*. If, indeed, by reason of the neglect complained of, the cattle had contracted a contagious disease, the case would have been different. But as the case stands on this declaration, the answer to the action is this: Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose.

POLLOCK, B. I also think this demurrer must be allowed. I agree that it is essential to remember that this action is founded on a contract, a contract between the freighter and the shipowner, and in that respect (and for other reasons also), it differs from the case of *Stevens v. Jeacocke* (1), and more nearly resembles *Atkinson v. Newcastle and Gateshead Waterworks Co.* (2) Now in this state of circumstances it would be open to the plaintiffs

(1) 11 Q. B. 731; 17 L. J. (Q.B.) 163.

(2) Law Rep. 6 Ex. 404.

to allege negligence generally on the part of the shipowner, and then the observations would apply which were made in *Blamires v. Lancashire and Yorkshire Ry. Co.* (1), where the Lord Chief Baron laid down the law very clearly in terms which were afterwards approved of in the Exchequer Chamber. The whole question would be open to the jury, whether the defendant had been guilty of negligence in omitting to observe a precaution pointed out in the order in question. But here no other negligence is alleged than the omission of that precaution; we must assume that the sheep were washed overboard merely in consequence of that omission, and the question is, whether that washing away gives a cause of action to the plaintiffs. Now, the Act of Parliament was passed alio intuitu; the recital in the preamble and the words of s. 75 point out that what the Privy Council have power to do is to make such orders as may be expedient for the purpose of preventing the introduction and the spread of contagious and infectious diseases amongst animals. Suppose, then, that the precautions directed are useful and advantageous for preventing animals from being washed overboard, yet they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action.

AMPHLETT, B. I am of the same opinion.

*Judgment for the defendant.*

Attorneys for plaintiff: *Pyke, Irving, & Pyke, for H. & J. E. Joel, Newcastle-on-Tyne.*

Attorneys for defendant: *Ingledeu, Ince, & Greening.*

(1) Law Rep. 8 Ex., 283.

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## THE GREAT NORTHERN RAILWAY COMPANY v. SWAFFIELD.

April 22.*Carrier—Railway Company—Failure of the Consignee to take Delivery—Lien for Charges.*

The defendant sent a horse by the plaintiffs' railway directed to himself at S. station. On the arrival of the horse at S. station at night there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined and went away without the horse, which remained at the livery stable.

The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm and with payment of a sum of money for his expenses and loss of time.

Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it. In an action brought to recover the amount of the charges:—

*Held*, that the plaintiffs acted reasonably in putting the horse in the livery stable, and that the defendant, having refused to take the horse, was liable to the plaintiffs for all the livery charges which they had paid.

## APPEAL from the Bedfordshire county court.

This was an action brought to recover the sum of 17*l.* paid by the plaintiffs to a livery stable keeper for the keep of the defendant's horse, under the following circumstances.

On the 5th of July, 1872, the defendant, who lived at Wootton, fifteen miles from Sandy Station, sent a horse by the plaintiffs' line from King's Cross to Sandy, consigned to the defendant himself at Sandy, the fare being prepaid. When the horse arrived at Sandy, at 10 P.M., there was no one at the station to receive it on behalf of the defendant, and by the direction of the station-master, who did not know the defendant's residence, the horse was taken to a livery stable near the station, kept by one Bennett, for safe custody. Soon after the horse had been placed there the defendant's servant arrived at the station, and, producing the horse ticket which the defendant had received from the plaintiffs, asked for delivery of the horse. The station-master told the servant that the horse

was at the livery stable, and that he could have it on payment of the livery charges, which Bennett's ostler, who happened to be present, stated to be 6*d.* The servant refused to pay this sum, and went across to the stable and demanded the horse of Bennett, who said he might have it on the payment of 1*s.* 6*d.* The servant refused with some insolence to pay any money whatever, on which Bennett said that he should not have the horse except on the payment of 2*s.* 6*d.*, which is the usual and proper charge for one night's keep. The servant thereupon went away without the horse.

On the next morning the defendant came himself, and complained to the station-master (who was not previously aware of what had passed after the servant left the station) of the horse not having been delivered to his servant the previous night. The station-master offered that if the defendant would pay Bennett, and leave the receipt with him, he would represent the case to the superintendent with a view of getting the money from the plaintiffs; but the defendant refused to recognise Bennett in any way. Thereupon the station-master said that, rather than the defendant should go away without the horse, he would pay the charges out of his own pocket; but the defendant declared he would have nothing to do with it, and went away without the horse.

In reply to a letter written the same day by the defendant to the general manager of the plaintiffs, stating that he left the horse in the company's hands, and claiming 21*l.* for the price of the horse, and 30*s.* for his and his man's expenses and loss of time, the station-master wrote to the defendant on the 8th of July, offering to deliver the horse without payment of the livery charges, but stating that the company would look to the defendant for payment of the same. The defendant replied, refusing to come to Sandy for the horse, but offering to receive it if delivered at his farm by one o'clock the next day, free of expense, and with payment of 30*s.* for expenses and loss of time; otherwise he would not receive the horse at all. The station-master, in reply, stated that the horse would remain at the stable at the defendant's risk and expense.

The horse remained at the stables till the 18th of November, when the station-master sent it in charge of a porter to the

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residence of the defendant, who then received and kept it, no demand being then made for payment of the livery charges. The plaintiffs paid the livery charges, amounting to 17*l.*, for which they now sued the defendant.

The case was heard (without a jury) before the learned judge of the county court, who gave judgment for the defendant; the plaintiffs appealed.

The question stated for the opinion of the Court was, whether the plaintiffs were entitled to recover the whole or any part of the livery charges from the defendant; and if the Court should be of opinion that they were so entitled, judgment was to be entered for them for the amount of the charges, or such part thereof as the Court should think fit, with such costs as the Court should direct. (1)

*J. P. Aspinall*, for the plaintiffs, having stated the case, the Court called on

*Graham*, for the defendant. The plaintiffs were in the wrong in refusing to deliver the horse to the defendant's servant without payment of the livery charges. When they placed the horse in the livery stable they ceased to hold it as carriers, and held it only as livery stable keepers or warehousemen, and in that capacity they had no lien for the charges incurred: *Judson v. Etheridge* (2); *Orchard v. Rackstraw*. (3) They might have left the horse in the horse-box; but, admitting that what they did was a reasonable thing to do, they were still in the wrong in detaining the horse, and had no right afterwards to require the defendant to send for him, and their doing so was a continued refusal to deliver. If the livery stable keeper had a right to refuse delivery, the plaintiffs must be answerable for his refusal, for they had no right to make any contract with him which disabled them from delivering the horse; he was, in effect, only their agent. But if the

(1) The defendant had previously brought an action against the plaintiffs for the detention of the horse; the plaintiffs paid money into Court in respect of the detention of the horse before the defendant's refusal to receive him. The cause was tried before Bram-

well, B., at the Bedford Summer Assizes, 1873, and a verdict was found for the then defendants, the now plaintiffs.

(2) 1 C. & M. 743.

(3) 9 C. B. 698; 19 L. J. (C.P.) 303.

horse was out of their hands, so as to free them from the necessity of making any further delivery, then the only implied contract of the defendant was not with them, but with the livery stable keeper. In either event they cannot succeed in their action. The utmost they can recover in any case is the charge incurred before the refusal to deliver.

[POLLOCK, B., referred to *Cargo ex Argos*. (1)]

KELLY, C.B. We are all clearly of opinion that this judgment must be set aside, and judgment entered for the plaintiffs for 17l. It appears that the defendant caused a horse to be sent by the plaintiffs' railway to Sandy station; but the horse was not directed to be taken to any particular place. The owner ought to have had some one ready to receive the horse on his arrival and take him away; but no one was there. It does not appear that there was at the station any stable or other accommodation for the horse; and the question arises, what was it, under those circumstances, the plaintiffs' duty, and consequently what was it competent for them to do? I think we need do no more than ask ourselves, as a question of common sense and common understanding, had they any choice? They must either have allowed the horse to stand at the station—a place where it would have been extremely improper and dangerous to let it remain; or they must have put it in safe custody, which was what in fact they did in placing it in the care of the livery stable keeper. Presently the defendant's servant comes and demands the horse. He is referred to the livery stable keeper, and it may be (I do not say it is so) that upon what passed on that occasion the defendant might have maintained an action against the plaintiffs for detaining the horse. (2) But next day the defendant comes himself; the charges now amount to 2s. 6d.; an altercation takes place about this trumpery sum, and ultimately the station-master offers to pay the charges himself if the defendant will take the horse away; but the defendant refuses and leaves the horse at the stable. Then a correspondence ensues between the parties, in which the defendant is told that he can have the horse without payment if he sends for it, but he refuses, and says that unless the horse is sent

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(1) Law Rep. 5 P. C. 134.

(2) See note (1), ante, p. 134.



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to him with 30s. for expenses and loss of time by to-morrow morning he will not accept it at all; and he never sends for the horse. Meanwhile the plaintiffs run up a bill of 17l. with the livery stable keeper with whom they placed the horse, which they ultimately have to pay; and at last they send the horse to the defendant, who receives it; and they now sue him for the amount so paid.

I am clearly of opinion that the plaintiffs are entitled to recover. My Brother Pollock has referred to a class of cases which is identical with this in principle, where it has been held that a shipowner who, through some accidental circumstance, finds it necessary for the safety of the cargo to incur expenditure, is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. That is exactly the present case. The plaintiffs were put into much the same position as the shipowner occupies under the circumstances I have described. They had no choice, unless they would leave the horse at the station or in the high road to his own danger and the danger of other people, but to place him in the care of a livery stable keeper, and as they are bound by their implied contract with the livery stable keeper to satisfy his charges, a right arises in them against the defendant to be reimbursed those charges which they have incurred for his benefit.

PIGOTT, B. I am of the same opinion. I do not think we have to deal with any question of lien. We have only to see whether the plaintiffs necessarily incurred this expense in consequence of the defendant's conduct in not receiving the horse, and then whether, under these circumstances, the defendant is under an implied obligation to reimburse them. I am clearly of opinion that he is. The horse was necessarily put in the stable for a short time before the defendant's man arrived. I give no opinion on what then passed, whether the man was right, or whether the plaintiffs were right; I think it is not material. On the following day the defendant comes himself; and the basis of my judgment is, that at that time the station master offered, rather than the defendant should go away without the horse, to pay the charge out of his own pocket; but the defendant declared he would have nothing to do with it, and went away. That I

understand to be the substance of what was proved ; and if that be so, it shews to me that there was a leaving of the horse by the defendant in the possession of the carriers, and a refusal to take it. Then what were the carriers to do ? They were bound, from ordinary feelings of humanity, to keep the horse safely and feed him ; and that became necessary in consequence of the defendant's own conduct in refusing to receive the animal at the end of the journey according to his contract. Then the defendant writes and claims the price of the horse ; and then again, in answer to the plaintiffs' offer to deliver the horse without payment of the charges, he requires delivery at his farm and the payment of 30s. ; in point of fact, he again refuses the horse. Upon the whole, therefore, I come to the conclusion that, whoever was right on the night when the horse arrived, the defendant was wrong when, on the next day, he refused to receive him ; that the expense was rightly incurred by the plaintiffs ; and that there was, under these circumstances, an implied contract by the defendant entitling the plaintiffs to recover the amount from him.

POLLOCK, B. I am of the same opinion. If the case had rested on what took place on the night when the horse arrived, I should have thought the plaintiffs wrong, for this reason, that although a common carrier has by the common law of the realm a lien for the carriage, he has no lien in his capacity as warehouseman ; and it was only for the warehousing or keeping of this horse that the plaintiffs could have made any charge against the defendant.

But the matter did not rest there ; for it is the reasonable inference from what is stated in the case, that on the next day, when the defendant himself came, he could have had the horse without the payment of anything ; but he declined to take it, and went away. Then comes the question, first, What was the duty of the plaintiffs, as carriers, with regard to the horse ? and secondly, If they incurred any charges in carrying out that duty, could they recover them in any form of action against the owner of the horse ? Now, in my opinion it was the duty of the plaintiffs, as carriers, although the transit of the horse was at an end, to take such reasonable care of the horse as a reasonable owner would take of his own goods ; and if they had turned him out on the highway, or allowed him

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to go loose, they would have been in default. Therefore they did what it was their duty to do. Then comes the question, Can they recover any expenses thus incurred against the owner of the horse? As far as I am aware, there is no decided case in English law in which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. But in my opinion he is so entitled. It had been long debated whether a shipowner has such a right, and gradually, partly by custom and partly by some opinions of authority in this country, the right has come to be established. It was clearly held to exist in the case of *Notara v. Henderson* (1), where all the authorities on the subject are reviewed with very great care; and that case, with some others, was cited and acted upon by the Privy Council in the recent case of *Cargo ex Argos*. (2) The Privy Council is not a Court whose decisions are binding on us sitting here, but it is a Court to whose decisions I should certainly on all occasions give great weight; and their judgment on this point is clearly in accordance with reason and justice. It was there said (3) (after referring to the observations of Sir James Mansfield, C.J., in *Christy v. Row* (4)), "The precise point does not seem to have been subsequently decided, but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined." Then, after citing the cases, the judgment proceeds: "It results from them, that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." That seems to me to be a sound rule of law. That the duty is imposed upon the carrier, I do not think any one has doubted; but if there were that duty without the correlative right, it would be a manifest injustice. Therefore, upon the whole of the circumstances, I come to the conclusion that the claim of the company was a proper one, and that the judgment of the learned judge of the county court must be reversed.

(1) Law Rep. 7 Q. B. 225, at pp. 230-235.

(2) Law Rep. 5 P. C. 134.

(3) Law Rep. 5 P. C., at p. 164.

(4) 1 Taunt. 300.

AMPHLETT, B. I am of the same opinion. It appears to me that this case, though trumpery in itself, involves important principles. I think it is perfectly clear that the railway company, when the horse arrived at the station, and no one was there to receive it, were not only entitled but were bound to take reasonable care of it. As a matter of common humanity, they could not have left the horse without food during the whole night, and if they had turned it out on to the road, they would not only have been responsible to the owner, but if any accident had happened to the general public, they would have incurred liability to them. Therefore, as it appears to me, there was nothing that they could reasonably do except that which they did, namely, send it to the livery-stable keeper to be taken care of.

Then comes the question discussed by my Brother Pollock, and on which I should not dissent from him without great diffidence, whether a lien existed for these charges. As at present advised, I should not wish to be considered as holding that in a case of this sort, the person who, in pursuance of a legal obligation, took care of a horse and expended money upon him, would not be entitled to a lien on the horse for the money so expended. But really the point does not arise; whatever might be the case with regard to it, that question appears to me to be got rid of by what followed; because, even if the company were wrong in claiming payment of the 6*d.*, or whatever the sum might be, on the night when the horse arrived, the whole thing was set right by them on the next day, when the defendant himself came to the station, and the station-master offered to pay the charge in order that the defendant might have the horse. The defendant refused that very reasonable offer; and what, then, was the company to do with the horse? What else should they do but leave it with the livery-stable keeper, where it was being taken care of? At last, after a bill of 17*l.* had been incurred, the horse was sent to the defendant, and the question is, who is to pay that sum of 17*l.*?

Now, who was in the wrong? Even if the plaintiffs were in the wrong originally, of which I am by no means sure, in not giving up the horse on the night when it arrived, at any rate from the time when that was set right it was the defendant who was in the wrong, and the company who were in the right. It appears

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to me, therefore, quite clear that the company are entitled to recover the money which they have been obliged to pay, and have paid, to the livery-stable keeper, and that the judgment of the learned judge of the county court must be reversed, and judgment entered for the plaintiffs.

*Judgment reversed.*

Attorneys for plaintiffs: *Johnston, Farquhar, & Leach.*

Attorney for defendants: *W. Rogers.*

*May 5.*

THE ATTORNEY GENERAL v. PRATT.

*Probate Duty—Assets within the Jurisdiction—Bills of Exchange.*

P., resident in India, directed his bankers there to realise certain securities, and transmit the proceeds to his bankers in England. The securities were realised, and the proceeds transmitted in bills of exchange payable six months after sight, and drawn by a bank in India upon a bank in London in favour of the testator's English bankers. Whilst the bills were on their way to England, P. died in India. The bills were received by his bankers in England and were accepted, and the proceeds were in due course collected by the bankers and were received by the defendant, whom the testator had appointed his executor in England, and who had taken out probate here:—

*Held*, that probate duty must be paid on the amount of the bills.

INFORMATION for probate duty. The information and answer stated the following facts:—

Archdeacon Pratt, of Calcutta, in or shortly before December, 1871, intending to return to England, instructed the Bank of Bengal, at Calcutta, to realise certain securities of his in India, and remit the proceeds to Coutts & Co., bankers, London.

The Bank of Bengal realised the securities, and remitted the proceeds accordingly in five bills of exchange, all dated prior to the 28th of December, made payable six months after sight, and drawn by the Chartered Mercantile Bank of India on the London Joint Stock Bank in favour of Coutts & Co. The bills amounted altogether to 9241*l.* 6*s.* 9*d.*

The bills were so remitted prior to the 28th of December, and on that day Archdeacon Pratt died in India, having by his will and a codicil appointed the defendant executor in England, and another person executor in India.

The bills arrived in January, 1872, and the proceeds were collected by Coutts & Co., and were, after probate, received by the defendant.

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On the 20th of September, 1872, the defendant proved the will and codicil in England; the personal estate was sworn under 300*l.*, and probate duty was paid on that amount, the defendant contending that no more duty was payable.

The Crown claimed further duty on the amount of the bills.

*Sir R. Baggallay, A. G., Holker, S. G., and W. W. Karlake*, for the Crown. It must be admitted that, according to the principles laid down in *Attorney General v. Hope* (1), probate duty cannot be claimed on "foreign funds" only because the probate is ultimately made available for their collection. But it cannot be said that these bills or their proceeds were in any sense foreign funds. If the bills are treated as assets, they were on their way to this country at the time of the testator's death, and actually reached England before the probate was granted. They were taken by virtue of the English probate, and could not be taken by virtue of any other; and to say that from the mere circumstance of their being on the high seas at the time of the testator's death, and out of every other jurisdiction, they are exempt from probate duty, would amount to saying that if a testator were to die at sea in his own yacht, with all his property on board, no probate duty would be payable on the estate. But if not the bills, but what they represented, are treated as the assets, then it is still more clear that probate duty is payable. They were drawn on a bank in England; if they had been accepted at the testator's death, no objection could possibly have arisen; but, though not yet accepted, they represented funds in the hands of the drawees, the existence of which is shewn by the fact that the drawees did accept, and in due course paid them. If the funds were not in England, it is impossible to say where they were; for it certainly cannot be said that the drawing of a bill shews funds in the hands of the drawer; on the contrary, it shews a claim by the drawer upon the drawee, and amounts in effect to an assignment of that claim to the person in whose favour the bill is drawn. If accept-

(1) 1 C. M. & R. 530; 8 Bli. N. R. 44.

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ance were refused this might shew that the claim had no existence, or at least displace the inference of its existence; but when the bill is accepted the claim is shewn to be real. At the time, therefore, of the testator's decease this claim belonged to Coutts & Co. on behalf of the testator, and was equivalent to assets in their hands belonging to the estate. The claim of the Crown is supported by *In the Goods of Wyckoff* (1), where administration was granted by the Court of Probate of assets, including unaccepted bills of exchange, belonging to and in the possession of the deceased, an American citizen, who died on board a British ship on the high seas bound for this country. [They also referred to *Attorney General v. Bouwens* (2) and *Perry's Executors v. The Queen.* (3)]

*Manisty, Q.C.*, and *Hemming*, for the defendants. The test of whether probate duty is payable is, not whether the assets cannot be obtained without probate, nor whether funds are ultimately transmitted to this country to be administered here, but what was the local situation of the assets at the time of the testator's death. This is clearly laid down in *Attorney General v. Dimond* (4), the principle of which, after being at first doubted, was finally established by *Attorney General v. Hope* (5), and is treated as settled by law in *Williams on Executors*, vol. i. p. 619, 7th ed. The reason of it is that probate only relates to the assets which were within the jurisdiction of the Ordinary at the time of the testator's death. If, therefore, the bills were the assets, they were certainly not within the jurisdiction, for the Ordinary never asserted title to property on the high seas: *Williams on Executors*, vol. i. p. 364, 7th ed. But if (which is the more correct view) it is not the bills that constitute the assets, then it is the debt represented by the bills. Now it is clear that where assets consist of simple contract debts, their locality is the place where the debtor resides, as was decided in the case of a bill in *Yeoman v. Bradshaw.* (6) The case, therefore, of *Attorney General v. Bouwens* (2) has no application, for that case related to bonds, which are treated as being themselves assets. The question is,

(1) 3 Sw. &amp; Tr. 20.

(2) 4 M. &amp; W. 171.

(3) Law Rep. 4 Ex. 27.

(4) 1 C. &amp; J. 356.

(5) 1 C. M. &amp; R. 530; 8 Bli. N. R. 44.

(6) Holt (Ca. temp.), 42.

where was the debtor? The only person who was in any sense a debtor was the drawer of the bills, who had, by drawing the bill, entered into an obligation to pay the amount, if the drawee either did not accept or did not pay; and the drawer was in India.

[PIGOTT, B. But where was the actual fund which the bills represented?]

In India. It certainly cannot be assumed that bills drawn payable six months after sight represented funds at that time in the hands of the drawees. But if it is doubtful where the funds were, the Crown cannot succeed; for the onus is on the Crown to shew affirmatively that the assets *were* within their jurisdiction, and that onus is not satisfied by shewing conjecturally that they might be. The case of *In the Goods of Wyckoff* (1) is no authority, as the point did not arise there, and there was no opposition.

KELLY, C.B. I am of opinion that the Crown is entitled to judgment. The result of all the authorities is, that where assets are beyond the jurisdiction at the time when the right to the duty attaches, duty is not payable on them; when they are in England at the time when the duty attaches, duty is payable. The case of *Attorney General v. Hope* (2) conclusively establishes this proposition. What, then, constituted the assets in the present case? Actually and de facto the bills in question were on the high seas. Now I do not know whether the point has ever been determined, but I am clearly of opinion that where property belonging to a British subject is on the high seas, and probate is taken out in this country, that property forms part of the estate and effects of the deceased subject to probate duty; otherwise the inconceivable result would follow, that if a person were to sail out in his yacht with valuable property on board, and died on the high seas, duty would not be payable on the yacht and the valuable property on board, on the ground that it was not at the time of death within the jurisdiction, though not within any other. I should in such a case decide without hesitation that such assets were part and parcel of the assets of the deceased in England, and as such liable to probate duty.

Now, considering the nature of the bills of exchange which

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(1) 3 Sw. &amp; Tr. 20.

(2) 1 C. M. &amp; R. 530; 8 Bli. N. R. 44.



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constituted the assets, on two grounds I am of opinion that the bills or the money they represented were assets subject to probate duty. In the first place, it is a fallacy to consider bills of exchange only under the notion of debts. There was in truth, at the time of the testator's death, no debt whatsoever from any person. The bills were drawn in India on a bank in London, but they had not reached maturity, they had not been accepted, they had not been even presented. There was, therefore, no debt; but I think they were nevertheless property and assets, on the simple ground that they were personalty in respect of which trover might have been maintained by the executor long before any debt or any debtor in respect of them existed. They were personal chattels of great value; and the lawful owner of them could, on the day after the decease of the testator, have sold them for something very little short of their full value. They were, therefore, assets belonging to the executor to which probate duty attached.

But, secondly, on the ground which has been chiefly adverted to by my learned Brothers, I am clear that the bills, or rather the money, property, or debt represented by them, are liable to probate duty, namely, on the ground that where assets consist of debts, they are assets where the debtor resides. There may, at first sight, seem to be some difficulty in applying this principle to the case, because at the time of probate no debt was due from any one. The drawer would only be under a liability in the event of the bill being dishonoured; the drawee was under no liability, because he had not yet accepted the bill; there was, therefore, no actual debtor in existence. We are therefore driven to see who in fact became the debtor and provided and paid the money. Now the bills were presented for acceptance in due time; they were accepted and paid at maturity; the only persons, therefore, who ever became debtors were the acceptors. They were resident in London, and the money came to hand in London; the assets, therefore, were in London.

Another question might have arisen (which might be subject to different considerations) if the drawees had refused to accept, or had not paid at maturity. That question is not raised here, and I shall not further advert to it.

Whether we consider the chattels as upon the high seas at the time of the testator's decease, or consider the locality of the debtor in London as governing the case, the matter is, to my mind, free from doubt, and our judgment must, therefore, be for the Crown.

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PIGOTT, B. I am of the same opinion. The law as to probate duty is clearly laid down in the case of *Attorney General v. Hope*. (1) "The words of the Act," says Lord Brougham, "refer not to the use eventually made of the probate, but distinctly to the purpose for which the probate was granted. The words of the schedule are to be the rule upon the present occasion; and they do not appear to me to shew that, though the probate has been eventually, *de facto*, made available to collect foreign funds, that circumstance is any test whatever in trying whether or not this case of foreign funds comes within the schedule." Therefore the question comes to be, whether the proceeds of the bills were at the time of the decease within the jurisdiction. Let us look at the existing state of things. Archdeacon Pratt had ordered the Bank of Bengal to realise certain securities, and to transmit the proceeds to Coutts' Bank in London. The bank had realized the securities, and purchased with the proceeds bills of exchange on London, all drawn in December, 1871, and before the death of the testator, and payable six months after sight. As far as the Bank of Bengal was concerned, they were no longer in any sense debtors of the deceased; they had done what they were employed to do, and had put the assets in the course of transmission to England. Now these bills might never have been accepted, and, if so, a liability would have arisen in the drawers; but this state of things did not arise, and we must put an ordinary construction on the transaction. The meaning of drawing a bill is, that the person on whom it is drawn has the money of the drawer either actually in his hands, or by arrangement in account, which is the same thing. Are we, then, to assume that the bills were properly or improperly drawn upon the London Joint Stock Bank? We must assume that they were properly drawn, as in fact the events have turned out. The effect is, that when the bills were drawn in

(1) 1 C. M. & R., at p. 560; 8 Bli. N. R., at p. 57.

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Calcutta upon London it was known that the money was in London; and in fact the bills come over and are duly accepted and paid. The *à priori* inference and the result correspond. What Lord Abinger says in *Attorney General v. Bouwens* (1) is applicable: "as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found." Here the real debtor on the 28th of December, 1871, was the London Joint Stock Bank. The bills of exchange were not themselves debts, but the evidence of title to debts, and the assets were with the debtors, the London Joint Stock Bank.

AMPHLETT, B. I am of the same opinion. The law is settled that we must look at the place where the assets are at the time of the decease. Here the assets are represented by the bills of exchange, which were then on their passage from India to England; but when the nature of a bill of exchange is considered, it will appear that they represent, but do not constitute, the assets. The testator had ordered his agent to pay money of his to a bank in London. If this order had not been complied with, the testator would have had a right of recourse to the drawer. But if it was complied with, and if either money or credit, which is what is represented by the bills of exchange, was in London, then the assets were in London. If it had been otherwise, then the assets would have been in India; but the proper construction of the existing circumstances is, that the assets were in England. Therefore, without going into the question as to whether property on board ship would be assets in England, which does not arise, and on which I say nothing, I am of opinion that our judgment must be for the Crown.

*Judgment for the Crown.*

Attorney for the Crown: *The Solicitor of Inland Revenue.*

Attorneys for defendant: *Perkins & Weston.*

(1) 4 M. & W. 171; at p. 191.

## STOCK AND OTHERS v. HOLLAND.

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*Bankruptcy Act, 1869, s. 87—Seizure and Sale—Payment to Sheriff to avoid Sale—"Proceeds of such Sale."*

May 8.

The sheriff having seized the goods of a trader debtor under an execution for more than 50*l.*, the debtor, before sale, paid him, on the 18th of November and the 21st of November, two sums of 100*l.* and 32*l.* respectively, on account of the debt. The judgment creditors knew of and assented to the payments. The debtor, on the 24th of November, filed a petition for liquidation, and a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently, on the 20th of December, trustees were appointed, who claimed the 132*l.* :—

*Held*, that the judgment creditors, having assented to the payments, were entitled to the money as against the trustees.

*Ex parte Brooke* (Law Rep. 9 Ch. 301) followed.

THE plaintiffs signed judgment in this action for 201*l.* 16*s.* 1*d.* on the 13th of November, 1873. Execution was issued on the same day. The sheriff seized the defendant's goods on the 14th. On the 18th the defendant (who was a trader) paid 100*l.* to the sheriff on account of the debt, and promised to pay the balance in a day or two. On the 20th of November the defendant saw one of the plaintiffs and told him of the payment, and begged that the execution might be withdrawn. The defendant also stated that his difficulties were only temporary, and that he would pay the balance due in two months. The plaintiffs agreed to grant his request on condition of his obtaining a surety to guarantee payment. This the defendant promised to do, and it was arranged that he should go the next day to Derby with the plaintiffs' solicitor to see the proposed surety. Next day, however, he telegraphed to the solicitor to postpone the journey until the day following. On the same day, the 21st, he paid 32*l.* more to the sheriff on account of the debt. On the 24th he filed a petition for liquidation in the Derbyshire County Court, and an order restraining the sale was served on the sheriff. No part of the goods seized had then been sold. The first meeting of creditors was held on the 20th of December, and two trustees were appointed, who, on the 22nd, demanded the sum of 132*l.*, which still remained in the hands of the sheriff. The sheriff thereupon took out an interpleader summons, upon the



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hearing of which, before Bramwell, B., a special case was directed to be stated, under the Common Law Procedure Act, 1860, s. 15, for the opinion of the Court. The affidavits used upon the hearing at Chambers, and which set forth the facts above stated, were ordered to constitute the special case. The question for the opinion of the Court was whether the plaintiffs were entitled to the sum paid to the sheriff by the debtor on account of his debt as against the trustees under the liquidation.

The case was first argued in Hilary Term last, before Kelly, C.B., Cleasby and Amphlett, BB., when judgment was reserved until the decision of the Court of Appeal in Bankruptcy upon an appeal then depending from the decision of Bacon, C.J.B., in *Ex parte Brooke*. The Lord Chancellor and Lords Justices heard the appeal on the 30th of January and the 13th of February last, when the decision of the Chief Judge was reversed. (1) The Court of Exchequer then directed this case to be reargued.

May 7, 8. *Arthur Charles*, for the plaintiffs. There is no question as to fraudulent preference in this case, and the only section of the Bankruptcy Act, 1869, under which the trustees can claim is the 87th. (2) But here the money paid cannot in any sense be considered as the proceeds of seizure and sale. There was no sale; and although, according to *Ex parte Rayner* (3), seizure without sale gives the trustee a title to the goods seized, the section cannot give him a title to money paid to avoid a sale of the goods as well as to the goods themselves. There is evidence that the plaintiffs knew of the payment, and assented to the sheriff holding the money for them, at the same time promising the debtor to withdraw the execution upon certain conditions. The money, therefore, was money received to their use in the sheriff's hands: *Morland v. Pellatt*. (4) Moreover, *Ex parte Brooke* (1) is decisive. There it

(1) Law Rep. 9 Ch. 301.

(2) The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87, enacts that, "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and sold, the sheriff shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon no-

tice being served upon him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale after deducting expenses, on trust, to pay the same to the trustee."

(3) Law Rep. 7 Ch. 325.

(4) 8 B. & C. 722.

was held that money paid to the sheriff to avoid seizure after the creditors had assented to the sheriff holding it, belonged to them, and not to the trustee. Here there was a seizure, but the principle of the decision applies.

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*Francis Turner*, contra. The circumstance that there had been a seizure distinguishes the present case from *Ex parte Brooke*. (1) The title of the trustees to the goods themselves, although there has been no sale, cannot be disputed. A sale, therefore, is not indispensable to the operation of sect. 87. The goods seized had ceased to belong to the debtor, and the money which he paid to release them must be taken to have been received by the sheriff for him, and accordingly passed also to the trustees. There is no sufficient evidence to warrant the conclusion that the plaintiffs had absolutely assented to the payments in such a sense as to constitute the sheriff their agent. Indeed, according to James, L.J., in *Ex parte Pearson* (2), the payment itself being made by the debtor to avoid a sale, is equivalent to a sale.

KELLY, C.B. In this case the sheriff had seized the debtor's goods under an execution, and the debtor, in order to prevent a sale, paid the sheriff two sums, of 100*l.* and 32*l.*, on account of the debt. The evidence is clear that these payments came to the knowledge of the creditors, and they delayed the sale of the goods seized in consequence. If no communication had been made to them, a question might have arisen as to whether payment to the sheriff was equivalent to payment to the creditors. But that question does not arise here; and it seems to me that the case of *Ex parte Brooke* (1) is in principle identical with the present case. We are bound by that authority, and I may add that it is one which commends itself to my mind as having been rightly decided.

It is argued that the payment is really equivalent to a sale. But that cannot be. The trustees have a good title to the goods seized, but they now want to have both money and goods. Clearly they are not entitled to the money where the payment of it to the sheriff is assented to by the creditors.

The payment is not contended to have been by way of fraudulent preference. There was pressure, there was consideration for

(1) Law Rep. 9 Ch. 301.

(2) Law Rep. 8 Ch. 667, at p. 672.

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the payment, namely, the delay in completing the execution, and the debtor was not contemplating bankruptcy. Unless, therefore, s. 87 of the Bankruptcy Act, 1869, is applicable, the plaintiffs are entitled to the money. But for the reasons I have given I do not think this money is in any sense "proceeds of the sale" within the meaning of that section.

CLEASBY, B. I am of the same opinion. I think that *Ex parte Brooke* (1), which is a binding, and to my mind, satisfactory authority, concludes this case. There money was paid before seizure to the sheriff to prevent the execution being levied, and the Chief Judge decided (2) that money so paid was in the sheriff's hands as the officer of the Court. But, on the appeal, it appeared that the execution creditor had assented to the mode in which the money had been paid, and thereupon the Court of Appeal reversed the Chief Judge's decision. It is said the case is distinguishable from the present one on two grounds. First, there was a seizure here. But I do not think this makes any difference. The money was paid here, as it was there, to prevent the execution from being completed and, as soon as it was assented to, became the money of the creditor. Secondly, it is contended that the plaintiffs never absolutely assented to the payment, and in one sense, no doubt, the assent was conditional upon the defendant doing something which he failed to do. But it was an absolute assent for the time, and amounted to an agreement on the plaintiffs' part that, in consideration of the part payment of the debt, and of the defendant's undertaking to get a surety and pay the balance in two months, they would stay the execution. Upon the authority, therefore, of *Ex parte Brooke* (1), I think the plaintiffs are entitled to judgment.

AMPHLETT, B., concurred.

*Pigott*, who appeared for the sheriff, applied that the costs of the sheriff incurred at Chambers and on the argument might be paid by the trustees. The Court refused the application.

*Judgment for the plaintiffs.*

Attorneys for plaintiffs: *Vizard, Crowder, & Anstie*.

Attorney for trustees: *Dubois*.

(1) Law Rep. 9 Ch. 301.

(2) Law Rep. 9 Ch. 302, n (1).

## TRELOAR v. BIGGE.

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April 24.

*Landlord and Tenant—Covenant not to assign—Arbitrary Refusal—  
Qualified Covenant.*

A lessee covenanted with the lessor not to assign the demised 'premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:—

*Held*, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent.

*Seemle*, by Kelly, C.B., and Pollock, B. An "arbitrary" refusal is equivalent to an "unfair and unreasonable" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary."

DECLARATION that the defendant, by deed, demised to the plaintiff premises at 67, Ludgate Hill, for twenty-one years, from the 25th December, 1864, subject to a covenant that the plaintiff would not assign or underlet the premises, or any part thereof, without the consent in writing of the defendant, and that the defendant covenanted with the plaintiff that he would give such consent when the same should be reasonably required, and would not arbitrarily withhold the same; that the plaintiff was desirous of letting part of the premises, and applied for the defendant's consent, and all conditions, &c., were fulfilled, yet the defendant refused his consent and arbitrarily withheld the same.

The defendant pleaded, denying the covenant and the breach. Issue.

The cause was tried at the sittings in Middlesex after Michaelmas Term, 1873, before Kelly, C.B., when the following facts were proved:—

The plaintiff was tenant to the defendant of premises at No. 67, Ludgate Hill, London, upon the terms of a lease, dated the 18th of January, 1865, for twenty-one years from the previous Christmas. The lease contained the following covenant:—

"And the said Thomas Treloar [the plaintiff] doth covenant with the said T. E. Bigge [the defendant] that he shall not nor will assign this present lease, or let, &c., or otherwise part with



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the premises hereby demised, or any part thereof, without the consent in writing of the said T. E. Bigge, such consent not being arbitrarily withheld."

The proviso for re-entry, which immediately followed the covenant, was in these terms:—"Provided, always, that if the said T. Treloar shall at any time assign, let, &c., the said premises, or any part thereof, without the consent in writing of the said T. E. Bigge first had and obtained, but such consent is not to be arbitrarily withheld, then it shall be lawful for T. E. Bigge to re-enter."

In March, 1870, the plaintiff applied to the defendant for leave to underlet a part of the premises to the National Provincial Plate Glass Company for one year. The defendant had meanwhile become aware that the Commissioners of Sewers for London would require the premises, although no formal notice to treat had then been served; and on the 26th of March he replied, "upon advice," that "he could not agree to the plaintiff's proposition, under the altered circumstances of the probable tenure" of his property. The plaintiff's solicitors renewed the application, and requested the defendant to re-consider the matter. He replied, adhering to his former resolution. The underletting, he said, would be no profit to him, and, if the city authorities took the property, merely an advantage to the plaintiff. The premises were afterwards taken by the Commissioners of Sewers, under 57 Geo. 3, c. xxix. The plaintiff now claimed 150*l.* as damages, which he alleged he had sustained through the defendant's "arbitrary" refusal to consent to the proposed underletting. The learned judge asked the jury whether the refusal by the defendant was arbitrary, and on this point they found for the plaintiff. But being of opinion that the words in the lease did not constitute a covenant on the defendant's part, and that if they did, there was no evidence to justify the finding of the jury, the learned judge directed a nonsuit to be entered, with leave to move to enter a verdict for the plaintiff for 150*l.* In Hilary Term last a rule was obtained accordingly, upon the ground that the lease contained either expressly or by implication the covenant declared upon, and that there was evidence to go to the jury that the consent of the plaintiff had been arbitrarily refused.

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April 23. *J. Brown, Q.C., and Lumley Smith* shewed cause. First, there is no covenant on the defendant's part such as is declared on. In *Wolveridge v. Steward* (1), the principle governing this case is laid down thus: "It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words which shew an agreement to do a thing make a covenant;' but it must be clear that they are meant to operate as an agreement, and not merely as words of condition or qualification." It is impossible to say that the words in the covenant by the plaintiff not to assign, taken alone, are more than words of qualification. Their effect is to leave the tenant at liberty to assign without the landlord's consent, if such consent be arbitrarily withheld. But it will be contended that the proviso for re-entry contains an express covenant by the defendant. It is, however, merely a repetition of the qualification, and limits the right of entry to the case of the tenant having assigned without the defendant's consent in writing, such consent not having been arbitrarily withheld. Secondly, there has been no arbitrary refusal here. The defendant refused after consideration and "upon advice." He was not bound to declare his reasons for refusing: *In re Gresham Life Assurance Society*. (2)

*Day, Q.C., and Petheram*, in support of the rule. The words of the covenant constitute a covenant in express terms by the defendant not arbitrarily to withhold his assent. And if this be doubtful as to the covenant, the proviso is unambiguous. There the words are contained in a separate clause, "but such consent is not to be arbitrarily withheld." This is more than a qualification upon the defendant's right of re-entry. It is within the principle which has been referred to, and amounts to a distinct agreement not to withhold consent arbitrarily. If this be so, there was evidence to support the finding of the jury. The defendant refused "upon advice," but he gave no reason whatever, and the circumstances of the case disclose none. *In re Gresham Life Assurance Society* (3) is not applicable. There the directors had power to refuse transfers of shares unless the transferee was "approved of," and they acted as arbitrators in the matter. But here the jury were

(1) 1 C. & M. 644, at p. 657.

(2) Law Rep. 8 Ch. 446, per Mellish, L.J. at p. 451.

(3) Law Rep. 8 Ch. 446.

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justified in supposing that the defendant was acting from mere caprice. In *Marshall v. Bishop of Exeter* (1), an allegation in a plea to a declaration in quare impedit that the defendant (the bishop) had "good reason" to believe that the presentee had been guilty of an ecclesiastical offence was held insufficient. So here the defendant ought to have given his grounds for refusing his assent. In *Sheppard v. Hong Kong and Shanghai Banking Corporation* (2), a very similar clause was conceded to be a covenant by the lessor, and it was there held that strong grounds for refusing assent must be established. Again, the word "arbitrary" must be interpreted with reference to the proposed assignee, to whom there could be no possible objection in this case.

*Cur. adv. vult.*

April 24. KELLY, C.B. Two questions arise in this case, the first being whether certain words introduced in the clause prohibiting assignment, and whereby the plaintiff covenants not to assign without licence in writing, amount to an absolute covenant on the part of the lessor not to withhold his consent arbitrarily. I am of opinion that they do not constitute a covenant on which the lessee can sue, but are words, the only effect of which is to qualify the generality of the phrase into which they are introduced. The plaintiff covenants that he will not assign the lease or the premises demised "without the consent in writing of the said T. E. Bigge" (the defendant) "first had and obtained," and if the words stopped there the tenant's covenant would be absolute, but they are qualified by the words "such consent not being arbitrarily withheld." Now the rule of law, no doubt, is that any words in a deed which impose an obligation upon another amount to a covenant by him; but the words must be so used as to shew an intention that there should be an agreement between covenantor and covenantee to do or not to do a particular thing. I cannot find any such intention here. The words, taken grammatically, do not seem to me to amount to an undertaking by the lessor, but are a part of the same sentence as that containing the lessee's covenant, and qualify its generality. They prevent that covenant

(1) Law Rep. 3 H. L. 17.

(2) 20 W. R. 459.

operating in any case of arbitrary refusal on the part of the lessor, that is, in any case where, without fair, solid, and substantial cause, and without reason given, the lessor refuses his assent. I have known in my own experience several cases in which actions have been brought for the arbitrary withholding of consent by a landlord. But in all (as in the case of *Sheppard v. Hong Kong and Shanghai Banking Corporation* (1)) there was a covenant in express terms, so as to give the lessee a right of action. In the present case, for the reasons I have given, I think there was no such covenant.

Then it is contended that a covenant is contained in the proviso, and it is quite possible that if the words there used, and on which reliance is placed, had been used in another part of the deed, they might have been properly construed as amounting to a covenant. But the two clauses which follow each other must be taken together. The language is somewhat varied in the proviso, but substantially is to the same effect as that used in the covenant. It shews the description of refusal which is to give the right of re-entry. The qualified covenant not to assign is followed by the qualified covenant for re-entry.

The conclusion I have arrived at upon the construction of the deed renders it unnecessary to decide the question of arbitrary refusal. But I think it right, nevertheless, to express my opinion upon it, and in my judgment there was no evidence of any arbitrary refusal. The lessor took advice upon the subject, and acting upon that advice, refused his assent. It is impossible to say, when the circumstances of the case are considered—the nature of the property and the duration of the lease—that the defendant's act was arbitrary. It has been said that the refusal must be taken to be arbitrary if the character of the proposed assignee is such as cannot be objected to on any reasonable grounds. But I cannot assent to that view. The covenant is not qualified in that manner, as it might have been, and I think the defendant was entitled to refuse his assent upon any fair and reasonable ground. Now, here was an Act which enabled a public body to take possession of the premises, and the defendant knew they intended to take them. It might be an advantageous thing to be able to give the corporation

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early possession. It is an every-day matter in compensation cases for an extra sum to be paid for such possession, and the defendant might well desire not to assent to the coming-in of an assignee, who would not, of course, be as willing as the assignor to give up the premises. He would be buying them for occupation, while the old tenant, by the very act of wishing to assign, had shewn that he did not care to occupy any longer. It cannot be said that under such circumstances the refusal was arbitrary; that is, unfair and unreasonable. It might certainly be to the advantage of the defendant, and indirectly it would benefit the plaintiff too, who would, by reason of the non-assignment, receive compensation for his interest in the term. Upon both grounds, therefore, I think the rule should be discharged. My Brother Pollock concurs in this judgment.

AMPHLETT, B. The first question in this case is whether the lessee has any right of action on the covenant declared upon, and I am of opinion that he has not. It may be that the words themselves might, if it were necessary to carry out the intention of the parties, be sufficient to raise a covenant by implication in the lessor. But no such obligation ought to be implied if the true intention of the parties can be carried out by adopting a literal and natural construction. Now, looking at the place in which the words relied on occur, I think they ought to be construed as a qualification on the covenant of the lessee. That covenant is in derogation of his common law rights, and it is more convenient and reasonable to hold that the words were introduced to limit the generality of the covenant than to hold them to impose an obligation on the lessor. The true interpretation of the words, I think, is to release the plaintiff from his covenant not to assign without the plaintiff's assent, if that assent is arbitrarily withheld. If that be so they cannot be construed as creating a cross liability. They either qualify the tenant's covenant, or they create a covenant on the landlord's part. They cannot do both. If they create a covenant the result would be that, even although there was an arbitrary refusal, the lessee would be unable to assign without incurring a forfeiture. If he did assign he would be liable to eviction, and yet would have an action accrued to him

against his landlord in respect of the arbitrary refusal. Such a construction would be highly inconvenient, and there is nothing in the words which renders it necessary so to construe them. The other construction is the more convenient. The lessee may assign, if the lessor arbitrarily refuses his assent, without any assent, and the arbitrary refusal would be an answer to any proceedings which might be taken against him. The lessor, on the other hand, would escape a continual liability to a cross action. Upon the second question I feel some doubt. It has been fully discussed by my Lord; but as it is unnecessary to our decision, I do not desire to express any opinion upon it.

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*Rule discharged.*

Attorneys for plaintiff: *Hyde & Tandy.*

Attorney for defendant: *Dobie.*

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WILLIAMS v. THE GREAT WESTERN RAILWAY COMPANY.

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*April 17.*

*Duty to fence—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 47, 61—26 & 27 Vict. c. 92, s. 6—Public Footpath crossed on the Level—Evidence of Negligence.*

The defendants' line crossed a public footpath on the level; but the defendants had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61.

The plaintiff, a child of four years and-a-half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train:—

*Held*, that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to fence.

ACTION brought to recover damages for personal injuries suffered by the plaintiff through the defendants' negligence.

The cause was tried before Keating, J., at the Denbighshire Summer Assizes, 1873, and the following facts appeared:—At the place where the accident occurred the defendants' line ran for some distance on the level across a piece of open ground, and for a space of about 150 yards was wholly unfenced. At a point in this unfenced part it was crossed by a public carriage road on the level, and at another point, about thirty yards off, by a public footpath,

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also on the level, which struck off from the road some little distance before it reached the line.

On the 22nd of December, 1871, the plaintiff, a child of four and-a-half years old, was found lying on the rails by the footpath, with one foot severed from his body. There was no evidence to shew how the child had come there, beyond this, that he had been sent on an errand a few minutes before from the cottage where he lived, which lay by the roadside, at about 300 yards distance from the railway, and farther from it than the point where the footpath diverged from the road. It was suggested on the part of the defendants that he had gone along the road, and then, reaching the railway, had strayed down the line; and on the part of the plaintiff, that he had gone along the open footpath, and was crossing the line when he was knocked down and injured by the passing train. The learned judge thought there was no evidence to go to the jury of liability on the defendants, and nonsuited the plaintiff, reserving leave to him to move to enter a verdict for 250*l.*, the amount at which the jury had, by consent, assessed the damages, if there was any evidence for the jury in support of the declaration. (1)

A rule having been obtained accordingly,

*McIntyre, Q.C.*, and *Horatio Lloyd*, contended that there was no act of negligence on the part of the defendants to which the accident could be attributed; that they were not bound to maintain a watchman at the footpath: *Stubley v. London and North-Western Ry. Co.* (2); that if there had been a watchman at the road, it could not be assumed that he would have seen what was going on upon the footpath; that a want of the usual warning, or an intimation of safety at the public road, might affect those coming by the high road, *Stapley v. London, Brighton, and South Coast Ry. Co.* (3), but not those coming by the footpath; that if

(1) The declaration contained four counts—1. Alleging negligence in the defendants in not placing gates at a public carriage way crossed by the railway, nor watching it; 2. In not taking reasonable care for the protection of persons using a public highway

crossed by the railway; 3. In not fencing the railway from the adjoining land; 4. In negligently managing the railway, and the trains running thereon.

(2) Law Rep. 1 Ex. 13.

(3) Law Rep. 1 Ex. 21.

the child got on to the line by the high road, and then strayed down the line to where he was injured, he was simply a trespasser, and not in any sense lawfully on the line; that if there had been a gate or stile at the footpath, and the child went that way, there was no reason to say that he would have been stopped or turned back; and that the case was simply, like that of *Singleton v. Eastern Counties Ry. Co.* (1), an unexplained accident.

*Morgan Lloyd, Q.C.*, and *English Harrison*, for the plaintiff, contended that in *Singleton v. Eastern Counties Ry. Co.* (1) the plaintiff was wrongfully upon the railway, and no negligence was shewn in the defendants; that here the plaintiff was rightfully on the railway, and there was ample evidence of negligence, none of the precautions prescribed by 8 & 9 Vict. c. 20, ss. 47, 61, and 26 & 27 Vict. c. 92, s. 6, having been observed (2); that the only question was whether that negligence could be reasonably connected with the accident; that in determining this, all the circumstances must be taken into account; that in a way open to the public the safety of the whole public is to be considered, and that of the weakest and least capable most; that although 8 & 9 Vict. c. 20, s. 47, mentions cattle, the precautions enacted by it were not directed to the safety of animals, either exclusively or chiefly, but to the safety of human beings, and especially of the infirm and the young; that s. 61 does not even mention cattle; that if such a warning and protection as is afforded by a gate or stile had existed on the footpath, the child would very probably have been stopped altogether, or would at least have been checked long enough to see his danger; and that there were therefore circumstances which could not be withdrawn from the jury, and on which they would have been entitled to find for the plaintiff.

(1) 7 C. B. (N.S.) 287.

(2) By 8 & 9 Vict. c. 20, s. 47, when a railway crosses a public carriage road on the level, the company are to erect and maintain gates across the road, and to employ persons to open and shut the gates, which are, when closed, to fence in the railway and prevent cattle or horses from entering the railway; and by s. 61, when a railway crosses a public highway other than a public car-

riage way on the level, the company are, if the way is a bridle way, to erect and maintain gates, and if a footway, gates or stiles.

By 26 & 27 Vict. c. 92, s. 6, when a railway crosses a public carriage road on the level, the company are to erect and maintain a lodge, and keep a proper person to watch or superintend the level crossing.



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KELLY, C.B. My mind has fluctuated, but I have finally come to the conclusion that the true question is as Mr. Harrison put it, not so much whether there was negligence on the part of the company (as to which there is no doubt), but whether that negligence was so connected with the accident to the plaintiff as to entitle a jury to be consulted as to whether the action is maintainable.

The facts are, that a child, of tender years but of sufficient age to be able to cross the line by itself, was found on the footpath at the level crossing with its foot severed from its body, and the questions are, first, whether there was any negligence on the part of the defendants which could have contributed to the accident; secondly, whether such negligence was the cause of the accident.

As to the first point, it is impossible to imagine a case where negligence is more clearly made out, or more inexcusable. A carriage-way of considerable width passed over the line on a level, and about thirty yards distant from this a footway crossed the line, also on a level. There was a clear statutory duty to have gates on both sides of the carriage-way, which ought to be kept closed except when animals or vehicles are crossing the line; and as to the footpath, it was equally required for the protection of the public that a gate or stile should be placed at each side of the railway. Both these duties were left unperformed. This was clearly negligence. I say nothing more as to the carriage-way, because there is no evidence by which it is possible to connect the negligence of the company in this respect with the accident. But the law also required a gate or stile to the footpath for the protection of the public, and perhaps peculiarly for the protection of human beings less able than ordinary persons to take care of themselves, as infants or infirm persons; but nothing of the kind was done. Now, it is very possible that the existence of a gate or stile upon the footpath might have prevented the child from going on, or might have detained him long enough to prevent this accident from happening. It is true these are only possibilities; but being such, and negligence being established in the defendants, the question is whether, considering the short time which had elapsed since the child left home, and all the other

circumstances of the case, a jury may not have been very well satisfied that one or other of those possibilities would have happened, and that if a stile or gate had been there this accident would not have occurred.

I do not say that it is not a case of difficulty, but it is one which might well have been submitted to the jury, and under these circumstances the rule must be made absolute to enter the verdict for the plaintiff for the sum assessed by the jury.

POLLOCK, B. The question in this case is whether there was any evidence that ought to have been left to the jury. I should be sorry to think that we were extending the rule on the subject of negligence which was laid down by Willes, J., in the case of *Daniel v. Metropolitan Ry. Co.* (1), in terms which were approved of in the Exchequer Chamber and the House of Lords (2), although the decision was itself reversed. "It is not enough for the plaintiff to shew that there has been an accident upon the defendants' line, and thence to argue that the company are liable even *primâ facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with reasonable certainty what particular precautions should have been taken."

Can we, consistently with the rule so laid down, hold that there was evidence which might have been submitted to the jury? Now as to there being a non-performance of what was enjoined by the Act of Parliament, there is no doubt about it; and it is not for us to speculate on what was the precise intention of the legislature when they required that there should be a gate or stile on a footpath crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment.

Then can it be inferred with reasonable probability that the accident occurred by reason of this negligence, so as to make this a question for the jury? I was at first impressed with the view

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(1) Law Rep. 3 C. P. 216, at p. 222.

(2) Law Rep. 3 C. P. 591; Ibid. 5 H. L. 45.

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that this was like the case in which it has been held that where there is an even balance of the evidence, so that no inference can be properly drawn one way more than the other, the judge must not leave the question to the jury. The real question is (as Mr. Harrison put it), whether the negligence can reasonably be so connected with the accident as to allow of a jury saying that it did in fact give occasion to it. Upon the whole, I think that there was evidence which might be left to the jury, and the rule must therefore be made absolute.

AMPHLETT, B. My opinion has fluctuated during the argument, but I have come to a conclusion satisfactory to my own mind that the verdict should be entered for the plaintiff. We start with the fact that the defendants have failed to comply with the express provisions of the statute, and this is an act of gross negligence. I think nothing turns on the neglect at the carriage-way. But the child was in fact found upon the footway, and the proper presumption is that it met with the accident on the footway, and whilst it was crossing the line. Then the child being lawfully on the footway, and the defendants being guilty of a breach of duty, the only question is whether there is reasonable ground for connecting this breach of duty with the accident. It is not necessary to decide this as a jury; it is enough to say that I think it was clearly a case which ought to be submitted to a jury. There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about, and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad. The rule must be made absolute.

*Rule absolute.*

Attorneys for plaintiff: *Kennedy & Hughes, for Jones, Wrexham.*  
Attorneys for defendants: *Young, Maples, & Co.*

THORN v. THE MAYOR AND COMMONALTY OF THE CITY OF  
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May 4.

*Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in Mode specified—Implied Warranty.*

The defendants being about to erect a bridge, an engineer prepared for them, at their request, certain plans and specification both of the bridge and of the mode in which it was to be constructed. The plaintiff, on the faith of these plans and specification, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specification. After the plaintiff had incurred great expense, it was found that the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them that the work could be executed in the manner described in the plans and specification:—

*Held*, that no such warranty could be implied.

SPECIAL CASE stated for the opinion of the Court.

The declaration alleged that the defendants guaranteed and warranted to the plaintiff that Blackfriars Bridge could be built according to certain plans and a specification then shewn by the defendants to the plaintiff, without tidework, and in a manner comparatively inexpensive, and that certain caissons shewn on the said plans would resist the pressure of water during the construction of the said bridge, whereby the plaintiff was induced to contract with the defendants for the construction of the said bridge for a certain sum of money far less than he otherwise would have done; and the plaintiff, relying on the said warranty, commenced the said bridge; whereas the said bridge could not be built according to the said plans and specification and without tidework, and the said caissons would not stand, whereby the plaintiff was compelled to expend divers large sums of money in endeavouring to build the said bridge and lost all the profits he otherwise would have realised in building the same.

The facts of the case were as follows: By the Blackfriars Bridge Act, 1863, the defendants were authorized, among other things, to pull down and remove the then existing Blackfriars Bridge and the works connected therewith, and to construct a new bridge and certain other works, as therein mentioned, across the river Thames; and they were further authorized to appoint a committee to carry the



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Act into execution; and it was enacted that such committee should have such or so many of the powers and authorities and discretion by that Act given to and reposed in the corporation as the corporation should think fit or proper to delegate to such committee. Shortly after the passing of the Act the corporation duly appointed a committee, and delegated to them all the powers of the corporation under the Act. The committee employed Mr. Joseph Cubitt as their engineer, and a specification and plans and drawings of the proposed works were prepared by him. (1)

The following are such portions of the specification as are material:—

By clause 1 of the specification the contract was to include the whole work to be executed, as shewn in the various plans or described in the specification, as well as all contingent works which, in the opinion of the engineer, were thereby implied, or were requisite for the due completion of the work shewn and described as to be executed under the contract.

By clause 11 the engineer was to be at liberty to vary the dimensions or position of the various parts of the works to be executed under the contract, without the contractor being entitled to any extra charge for such alteration, provided the total quantity of work should not thereby be increased or diminished; but if any greater or less quantity of work should be required, the contractor was to be bound to execute the same, and the addition or deduction, as the case might be, would be valued according to the schedule of prices to be delivered in the lump sum tender; and in case of any works not provided for in that schedule, then to be valued according to the schedule of the Government Board of Works in force at the time.

By clause 12 the contractor was bound, under penalty, to complete the whole of the work included in the contract within three years from the date when the work commenced.

By clause 26 and following clauses allowance was made for extras, but the question of payment was to be referred to the engineer, whose decision should be final and binding.

By clause 30 the contractors were to take out their own quantities.

(1) Both parties were at liberty on the argument to refer to any of these documents.

Clause 36 referred to plans and sections of the then existing bridge and the works executed thereon, and continued thus: "They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor would not be entitled to charge any extra should the work to be removed prove more than is indicated on these drawings."

By clause 54 the contractor was to satisfy himself as to the nature of the ground through which the foundations were to be carried; it was stated that all the information given on this subject was believed to be correct, but was not guaranteed.

By clause 63 the foundations of the piers were to be put in by means of wrought-iron caissons, as shewn in the drawing.

By the 64th and following clauses and the drawings referred to, the quantity of iron to be used in the caissons, the form and dimension of the ironwork, and the mode of making them water-tight by means of india-rubber, were detailed, and directions were given for lowering the caissons and getting them closed. By clause 77 all risk and responsibility involved in the sinking of these caissons was to rest with the contractor.

On the 5th of March, 1864, the committee issued an advertisement inviting tenders for the execution of the works comprised in the above-mentioned specification and plans, in which it was stated that the plans and specification might be seen, and further particulars obtained, upon application at the office of the engineer.

In consequence of this advertisement, the plaintiff and his brother and partner, Peter Thorn (since deceased) on the 22nd of April, 1864, sent in a tender to the corporation. Their tender was accepted, and a contract was afterwards, on the 24th of May, 1864, executed under seal by the contractors of the one part and the corporation of the other part, which, so far as is material, was as follows:

By this deed it was agreed that the contractors should execute, in a substantial manner, under the superintendence and according to the directions and to the satisfaction of the engineer, all the works of every description which should be required to be made, done, and executed in and about or connected with the pulling down and removing the existing Blackfriars Bridge, with its piers, abutments, stairs, and approaches, and the building and constructing the pro-

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posed new bridge across the River Thames at Blackfriars, including all piers, stairs, and approaches and carriage-way and footways over the same bridge, and adjoining thereto on each side up to the contract line according to the specifications prepared by the engineer and the drawings referred to in the said specification, and generally the whole of the works shewn on the said drawings or described or mentioned in the said specification, and also all contingent works which in the opinion of the engineer were implied thereby or requisite for the due completion of the works aforesaid, and should execute the works thereinbefore mentioned under and subject to the directions, rules, regulations, explanations, and instructions mentioned or referred to in the specification, and that with such alterations (if any) as might from time to time, in manner thereafter mentioned, be directed by the engineer.

That the contractors should make good any settlement, &c., which might happen to the new bridge or any of the works until the expiration of three calendar months from the date of the final certificate to be given by the engineer.

That the works should be commenced immediately after an order for that purpose, signed by the engineer, should have been given to the contractors, and after possession should have been given to the contractors of the ground on which the works were to be executed, and that they should be completed within three years from that time, unless hindered or delayed as thereafter mentioned.

That the contractors would execute all the works for £269,045*l.*, to be paid in manner thereafter mentioned, increased or diminished by such sums as should become payable, or should have to be deducted, as thereafter provided, in respect of alterations or variations in the works.

That it should be lawful for the engineer of the committee at any time or times during the progress of the works, to vary the dimensions or position of various parts of the works to be executed without the contractors being entitled to any extra charge for such alterations, provided the total quantity of work should not be increased or diminished thereby. But in case any greater or less quantity of work should be required by the engineer, the addition or diminution should be valued as therein mentioned.

That the contractors would execute and complete the works ac-

cording to every alteration and variation notified in writing by the engineer, and in the manner and within the time in and within which such works ought to be completed according to the true intent of the deed, or, in case the said works or any of them should be increased, then within such further or extended time (if any) as the engineer should certify by writing under his hand to be proper, and no such alteration or variation should vacate or lessen the validity of any of the covenants or agreements contained in the deed on the part of the contractors to be observed or performed, but such sum of money should be added to or deducted from the said sum of 269,045*l.* as should be estimated to be a fair proportionate addition or deduction to be allowed for such alterations or variations, as before mentioned.

That the contractors would guarantee the stability of all the works, notwithstanding the same might have been done with the approbation of the engineer, and would forthwith and without delay make good all damage which might happen to the works during their progress, and would make satisfaction for all damages sustained by third persons arising out of the execution of the works, and indemnify the defendants against claims in respect of such damage.

That in case they should, without the happening of any of such causes or excuses for delay as therein mentioned, fail to complete the works within three years, computed from the date of the order to proceed, they should be allowed further time for the purpose of completing the same upon the terms of the aforesaid sum of 269,045*l.*, being reduced by a reduction after the rate of 1000*l.* per calendar month for each and every month during which, or any fraction of which, the works should remain uncompleted after the expiration of the three years, such deduction being considered and accepted as an equivalent for the accommodation of the longer period thus allowed for the completion of the works, subject to a proviso that no deduction should be made, nor should any damages be payable for or in respect of such time as the engineer should by writing under his hand certify that the works had been delayed or suspended by reason or in consequence of bad weather, or inevitable accident, or other circumstances not avoidable by the exercise of reasonable care, skill, or diligence on the part of the contractors,

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or by or in consequence of any order of the engineer, or in consequence of any strike occurring amongst workmen after the commencement of the works.

The corporation did not nor did the committee at any time interfere in any way directly or indirectly with the engineer in his dealings with the contractors, or with their mode of conducting the works, or with any alterations in or additions to the plans and drawings.

The work was commenced by the contractors on the 7th of June, 1864, and by the following October had advanced far enough to enable them to begin putting in the foundations of the piers. They proceeded with this work in strict accordance with the specification and the drawings. The caissons were duly constructed, and the proper measures were taken for preparing the ground and for lowering and sinking the caissons; but it was then found necessary to strengthen them by introducing additional iron girders and temporary internal struts and other supports. These alterations were made by order of the engineer, and by this means the difficulties were overcome, and the caissons were sunk to the full depth shewn on the drawings.

After the separate caissons for forming one of the piers of the new bridge (as so altered and added to) had been lowered and sunk, and the foundations put in up to the level of the top of the permanent plates, it was found necessary, in consequence of the caissons not being of sufficient strength to resist the pressure of the water, to take away the two upper tiers of temporary plates, and to cut off the dam timbers to the top of the second plates. This brought the top of the caissons considerably below high-water mark; and it became necessary to build the rest of the pier by tide work.

By the original plan (if practicable) the water of the river when once pumped out would have remained excluded (very little pumping being thenceforth needed to keep the interior of the caissons dry) and the work of laying the masonry within the caissons, removing the caissons, and otherwise completing the piers, might have proceeded without intermission. The caissons as altered were filled with water at each tide, and had to be pumped dry after half tide before any masonry could be laid or other permanent work exe-

cutted, and the work had thus to be done intermittently, and at irregular times. This altered manner of executing the work was ordered by the engineer, and executed by the contractors, without objection, in all the piers of the bridge, and the piers were thus finally completed. By reason of the last-mentioned alterations, the contractors were delayed in the execution of the works, and put to considerable additional cost.

The difficulties in carrying out the work in accordance with the plans and designs of the engineer in the several respects before-mentioned were not known by the contractors at the time of entering into the contract, although they might have been discovered on careful examination of the specifications and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment before and at the time of tendering for the contract a civil engineer, who saw the plans, but no such careful examination had in fact been made by him, or by any other person on behalf of the contractors.

The contractors acted on the assumption of the specification and drawings being fit and sufficient, and of the plan and method of executing the works, as shewn and specified thereby, being fairly and reasonably practicable, and upon that assumption the quantities of the several materials which would be required, and the nature of the work, was calculated and estimated, and the tender was made. It was stated by the plaintiff and the civil engineer in his employment that it was the usage of contractors so to assume and to make their calculations and tenders upon that footing.

The bridge itself as finally built (notwithstanding any alterations in the mode of construction), was the same bridge as that originally designed by the engineer.

The contractors contended that the corporation having invited them to tender upon the specifications and drawings as prepared by their engineer, must be taken to have guaranteed to them that the same were reasonably fit and sufficient for the purposes of the works, and that the works could reasonably and properly be executed in accordance with the same, and that the plan and method of executing the same, as shewn and specified, were fairly and reasonably practicable, and consequently that the corporation

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were liable for the several faults and defects therein as before mentioned, and for the loss and damage thereby caused to the contractors.

The defendants contended that they were not liable, and that the advertisement, contract, plans, and specification did not shew or contain, nor could there be inferred from them, any such implied warranty on the part of the defendants as was stated and alleged in the declaration, and that the alterations mentioned above, and the additional expenses thereby incurred by the plaintiff, were matters to be dealt with by the engineer of the corporation under the contract.

The question for the opinion of the court was, whether there was any, and (if any) what implied warranty on the part of the defendants to the effect stated in the declaration, or so as to give to the plaintiff a cause of action against the defendants.

If the Court should be of opinion that such warranty existed, and that on the facts the plaintiff had a cause of action, then judgment was to be entered for the plaintiff for forty shillings damages with costs of suit.

If the Court should be of a contrary opinion, then judgment was to be entered for the defendants with costs of suit.

*Benjamin, Q.C. (Littler, Q.C., and J. W. Batten with him).* The plaintiff is 'entitled' to succeed if there is an implied warranty, or any cause of action disclosed on the facts. The work was to be done according to the specified method, and the failure of that was not contemplated by the parties. This damage is neither an extra, nor is it covered by the contract price. It amounts not to a mere addition or alteration, but to a total subversion of the whole original plan, and the substitution of a new one. The specification and contract provide nothing by way of indemnity in such case, the value of the alterations only being contemplated to be paid for as an extra, and this it is conceded has been done. There was an obligation on the contractors to do the work in three years, and it is the act of the defendants in not supplying proper plans that has prevented the plaintiff from doing this, and caused the loss.

[KELLY, C.B. Suppose the contractors had declined to continue

the works when they found the impossibility of carrying them on in this way.]

They might have done so, and sued the defendants, and their right to recover is not affected by continuing the work. The other clauses of the specification which expressly throw liability on the contractors, shew that no further liability on their part was contemplated. If this work was done under the original contract, the plaintiff has been delayed two years in doing it, and for this delay he has not been compensated. If not done under that contract then he has been paid for what he did under the new contract, but has received no compensation for breach of the old one. [He referred to *Roberts v. Bury Commissioners*. (1)]

*Giffard, Q.C.* (*Thesiger, Q.C.*, with him). The only question is whether there is an implied warranty. The contract as to the mode of building, and as to the building itself, cannot be separated. It is quite immaterial who furnished the plans, for the plaintiff has contracted to build the bridge in accordance with them, in a certain time and for so much money. It is he that has broken his contract, and if the work turns out to be impossible, instead of merely, as it is contended is the case here, more difficult, he is still bound by his contract. There is no question here of the defendants' default in supplying anything they ought to supply, or in keeping back anything which was only within their knowledge, and there is nothing that can import into the case the alleged warranty. [He referred to *Scrivener v. Pask* (2); *Hills v. Sughrue* (3); *Marquis of Bute v. Thompson*. (4)]

*Benjamin, Q.C.*, in reply.

*KELLY, C.B.* This is a case of very great importance to both the parties; but disengaging from the mass of matter before us all that portion which does not belong to the question we have to determine, the case is very simple. The corporation were desirous of entering into a contract for pulling down the old bridge of Blackfriars and substituting a new one. They employed an engineer to prepare plans and specification, which he prepared accordingly,

(1) Law Rep. 4 C. P. 755; in error,  
Law Rep. 5 C. P. 310.

(2) Law Rep. 1 C. P. 715.

(3) 15 M. & W. 253.

(4) 13 M. & W. 487.

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together with whatever else was necessary to enable contractors to come forward and make tenders for performing the work. The plaintiff came forward and proposed to execute the works as pointed out in the specification, and with the materials and in the time pointed out, and accordingly the contract was entered into. The work was begun, and the contractor commenced, after pulling down the old bridge, to build the new one. He followed the directions of the specification, by which the foundations of the piers were to be laid by means of iron caissons; the dimensions and materials of which were set out in the specification. After having sunk and completed four tiers of caissons, the water was pumped out, and it was found that the two upper tiers were insufficient to keep out the tidal water, and that in consequence it was necessary to remove them, in which case the building operations could only be continued when the tide permitted. The consequence was, that much more time was necessary to complete the works than would otherwise have been required; and the plaintiff was prevented from entering into other contracts, and in a variety of ways was put to much greater expense than if the work could have been continued and completed in the time described in the specification. On this he insists that the cause of the injury he has received is that the specification was insufficient and delusive, and, in truth, that it was impossible to execute the work in the manner pointed out, and he brings this action, and insists that though nothing of the kind appears on the contract, the defendants impliedly contracted that the work could be carried on in the mode and with the materials specified. The question arises whether, the contract being silent as to any such warranty, we are to presume, nevertheless, that such was the intention of the parties, and that the defendants did impliedly warrant that this work could be executed and completed according to the contract, and in the way and with the materials specified.

No authority has been cited to shew that in a contract of this kind there is any such implied warranty. We must beware how we hold that in contemplation of law people have contracted for something which is not to be found within the written contract to which they have put their hands, or that they must have intended something which they have not declared they intended, and which

one of the parties in this case certainly did not contemplate, namely, that the work contracted for could be performed in the time and mode contained in the specification. There is no authority for so holding, and, looking to principle, it appears to me that we should be making a contract for the parties, and a different one from that into which they have entered, if we implied this warranty. It is said that the engineer was the agent of the corporation, and must be taken to have contracted for and on behalf of the corporation that the specification was sufficient, and that it was reasonably practicable to execute the work in the mode prescribed; but the contract entered into by the plaintiff was absolute and unconditional, that he would execute these particular works for a certain sum and in a certain time.

Supposing it had turned out to be physically impossible to execute these works in the time named, could it be contended that because three years is named, the defendants have undertaken that the work can be executed in that time? It surely is a contractor's business to ascertain whether the work can be done in the time, judging as to that for himself from the mode in which the work is to be done, the materials to be used, and the other matters which he has to consider. How, then, can the corporation be said to have entered into an implied contract that the plaintiff could execute the works in the specified time? If a warranty to this effect had been alleged, the matter would have been hardly arguable, but the question whether the mode specified for doing the work is practicable, stands on precisely the same footing. Looking to the case, we find that the difficulties which prevented the work from being carried out in the manner originally contemplated were not known to the contractors or to the corporation. The latter had no more knowledge or means of determining this question than the former, and they took the advice of a competent person as to the work they desired to do. The other contracting parties might have done the same. It was evidently a case in which it was desirable that they should take the advice of a most competent engineer whether this work could be executed as proposed. How has the plaintiff any right to complain if, instead of arming himself with all the knowledge necessary to enable him to determine whether it was wise and prudent to take

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the contract, he enters into it without taking any of these steps in the matter? I cannot see that the corporation were bound to do more than they did, or that they incurred any liability on any warranty or promise entered into either by themselves or by their attorney or engineer on their behalf.

It is said, however, that if there be any other ground on which, upon the facts disclosed by the case, the plaintiff is entitled to recover against the defendant, we are at liberty to amend and adapt the record to the case set up. I can, however, see no right in the plaintiff under this contract except to be paid from time to time for the work he has completed, and that has been done. I am of opinion, therefore, that the defendants are entitled to judgment.

FIGOTT, B. I am of the same opinion. Looking at the question stated in the case for our determination, we have to see, first, if there is any warranty that can be implied, and next, whether there is any state of facts on which the plaintiff can recover. The contract has been carried out, and the bridge has been built according to the plans, though not by the method designated; but otherwise the contract is completed by the plaintiff building the bridge and the defendants paying the contract price and extras. This claim comes under neither of those heads, but is a claim for the loss incurred by the plaintiff through the alteration in the method of building, which was found to be necessary through the failure of that first proposed. The corporation are in the ordinary position of a person who employs an engineer or architect to explain what he wants done to another, who, having the plans and specifications before him, tenders for the work. I do not see what more the defendants had to do than to carry out the terms of the contract. I cannot see that they expressly or impliedly warranted that Mr. Cubitt could not or would not fall into error. Mr. Benjamin has pointed out several clauses in the conditions, and has argued that as the corporation in the cases he refers to threw on the contractors an express obligation or liability, they did not do so in other cases. But the clauses he refers to only go to shew that where they could anticipate a difficulty in doing the works they, by express contract, excluded

the liability of the corporation. This only shews that, in those matters which the parties contemplated, and as to which they thought that differences might arise, they provided beforehand, but it does not touch this particular dispute which they did not contemplate. The argument placed before us is, that this work must be taken to have been represented to the contractors as practicable, but I can find no basis or materials from which to draw such an inference.

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AMPHLETT, B. I am of the same opinion. The plaintiff, instead of employing on his own account a competent engineer, made his tender on the footing of the plans and specifications of the engineer of the corporation, who was known to him as an engineer of eminence and reputation. The contractor chose to rely on his well-known ability. If there had been any case set up of an attempt to impose on the contractors, this matter would have assumed a different aspect; but nothing of this kind is suggested. The question which underlies the whole matter is whether the corporation impliedly contracted that the plans were such as to make the work reasonably practicable. To say that a contractor who has chosen to rely on the name and reputation of the person employed by the other party, when he finds that he should not have done so, can make the principal liable, is going far beyond any case that has been cited. I can see no implied warranty such as is contended for. I have great doubts whether this alteration which actually took place comes within the powers of variation contained in the contract; but the contractor did not raise this objection, but, as found by the case, proceeded with the works in the new mode specified by the engineer. He seems to me to have sanctioned the act of the engineer in making the alteration, and it is now too late for him to say it is a matter *dehors* the contract, and to require an indemnity for the extra expense he has been put to. This is, however, a minor point; the principal matter is that in the contract I cannot find the implied warranty which the plaintiff endeavours to set up.

*Judgment for the defendants.*

Attorney for plaintiff: *J. B. Batten.*

Attorney for defendants: *F. Brand.*



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May 8.

## CHILD v. HEARN.

*Duty to fence—Straying Animals—Railway—Negligence—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 68—"Cattle."*

The plaintiff, a platelayer in the employment of a railway company, was returning from his work along their line upon a trolley propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolley; the trolley ran over the pigs and was upset, and the plaintiff was injured.

The defendant was owner of the adjoining land; the fence erected by the company under 8 Vict. c. 20, s. 68, was sufficient against horses, oxen, and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the defendant's pigs had in fact (as the jury found) crawled under the fence. There was evidence to shew that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to shew how the pigs got from defendant's farm yard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:—

*Held*, first, that the word "cattle" in 8 Vict. c. 20, s. 68, included pigs, and that the fence was, therefore, insufficient.

Secondly, that, assuming there was negligence in the defendant, the plaintiff could not recover, for that he was identified with the company whose line he was using for their purposes, and through whose neglect to erect and maintain a sufficient fence the accident was caused.

**ACTION** brought to recover damages for personal injuries caused to the plaintiff by the defendant's negligence. (1)

(1) Declaration: first count: that the plaintiff was a servant of the Great Eastern Railway Company, and was lawfully travelling on the railway of the said company, on a truck or trolley; that defendant was possessed and in the occupation of a close of land near the railway, and by reason thereof ought of right to have kept his close fenced so as to prevent his cattle and other animals from escaping thereout on to the railway, and causing damage to persons lawfully on the railway. Yet the defendant did not keep fenced his close as aforesaid, whereby divers cattle or other animals, to wit, pigs, of the defendant's escaped out of the close on to the railway, and ran against the said truck or trolley, whereby it was

upset and thrown off the line, and the plaintiff was thrown out and injured, &c.

Second count: that the defendant so negligently kept and managed certain pigs of the defendant's, that they ran against a truck on which the plaintiff was riding, whereby the truck was upset, and the plaintiff thereby injured, &c.

Pleas: 1, not guilty. 2, to the first count, that plaintiff was not lawfully travelling on the said railway as alleged. 3, to the same, that it was not any part of defendant's duty, nor ought he of right, to have kept the said close fenced as, or for the purposes alleged.

Issue.

On the trial of the cause before Bramwell, B., at Westminster, in Hilary Term, 1874, it appeared that on the 12th of July, 1873, the plaintiff, who was a platelayer in the service of the Great Eastern Railway Company, was returning from his work upon their line, in company with his fellow workmen, and with tools and materials, upon a trolley worked by hand, when some pigs of the defendant broke from a potato bed by the side of the line and within the railway fence, and ran over the line. The trolley passing over two of the pigs was upset, and the plaintiff's leg was broken.

The defendant was occupier of the land on both sides of the railway, which was severed land, and which the railway company were (by 8 Vict. c. 20, s. 68 (1)) under an obligation to fence. There was a fence consisting of posts and rails with quickset, which the jury found to be a sufficient fence against horses, oxen, and sheep; but there was a space of thirteen inches between the lowest rail and the ground, through which the pigs (which were described as 25s. pigs) might have crept, and the quickset was not grown enough to keep them out. The jury found as a fact that the pigs crawled under the fence. Some evidence was also given of the defendant having been warned on some previous occasion of his pigs being on the line, but there was no finding by the jury as to this; nor was there any evidence to shew how, on the present occasion, the pigs, which had been last seen in the defendant's yard, had got into the field adjoining the line, or thence on to the line.

The learned judge ruled that pigs were not included in the term "cattle" in 8 Vict. c. 20, s. 68; that the defendant was bound to keep his pigs within bounds; and that, treating the railway as a highway, he was answerable for the consequences of

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(1) 8 Vict. c. 20, enacts as follows:  
"And with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows:

"Sect. 68. The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say,

. . . . Sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining land not so taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway."

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their trespassing to any one lawfully using it. A verdict was entered for the plaintiff for 100*l.*, the amount assessed by the jury, the learned judge reserving leave to the defendant to move to enter a nonsuit or a verdict for him, on the ground that there was no evidence to go to the jury of liability on the part of the defendant, or that, on the findings of the jury, the verdict ought to have been entered for him.

A rule was obtained accordingly, and also for a new trial on the ground of misdirection in the learned judge in telling the jury that the defendant was bound to keep the pigs from straying on the line, and was liable to the plaintiff for damage sustained by him in consequence of the pigs so straying, without proof of the circumstances under which the pigs so strayed, and that 8 Vict. c. 20, s. 68, did not include pigs under the term "cattle."

*Bray (Morgan Howard with him)* shewed cause. First, it was not necessary that the plaintiff should shew any negligence in the defendant, for the defendant was bound to keep the pigs within his own boundary, and was liable for any damage done by them if they escaped. The law is so laid down by Williams, J., in *Cox v. Burbidge* (1): "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial." This was cited with approval, and acted upon, in *Fletcher v. Rylands*. (2) In *Cox v. Burbidge* (3) it was held that the defendant was not liable on the ground that the cause of action was an injury inflicted through the vice of the defendant's horse, and that there was no evidence of the scienter: *May v. Burdett* (4) having laid down that in such cases it is the keeping of a mischievous animal with knowledge of

(1) 13 C. B. (N.S.) at p. 438; 32 L. J. (C.P.) 89, at p. 91.

(2) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.

(3) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89.

(4) 9 Q. B. 101; 16 L. J. (Q.B.) 64.

its mischievous qualities, that constitutes the negligence, which, coupled with the consequent injury, gives the cause of action : see also *Read v. Edwards*. (1) In *Lee v. Riley* (2), however, it is laid down that where the animal trespasses, it is immaterial that the injury done was due to his vice.

[BRAMWELL, B. What was said there qualifies *Cox v. Burbridge* (3) to this extent, that where the animal is a trespasser on the plaintiff's land so that damages must be recovered, the fact that an injury done by it was due to the animal's vice, may be immaterial with reference to the liability of the owner to damages ; but the pigs were not trespassers as against the plaintiff ; the injury done to him was the only thing that gave him a cause of action.]

If not trespassers as against the plaintiff in the sense that they were on his land, they were at least wrongfully upon the railway as against him in this sense, that he was lawfully using the line, which is a public highway, and they were wrongfully there obstructing his use of it, and thereby causing the damage complained of. But however it might be if this were a case of vice, that difficulty does not occur here, because this injury was not due to any vice in the animals, but only to the propensity to stray, which is common to all animals, and which the defendant was bound to guard against. Secondly, there was evidence of negligence in the defendant, for he had been warned before of his pigs being on the line ; and, moreover, the fence was evidently insufficient against pigs of this size. Thirdly, the injury complained of was the natural result of the pigs straying, and, whether on the ground of the defendant's failure in his duty to keep the pigs in, or on the ground of special evidence of negligence, the defendant is liable for the consequences. If negligence is once established, it is no answer that it did much more damage than was expected : *Smith v. London and South-Western Ry. Co.* (4) ; *Bailiffs of Romney Marsh v. Trinity House* (5) ; *Sneesby v. Lancashire and Yorkshire Ry. Co.* (6) Nor is it any defence

(1) 17 C. B. (N.S.) 245 ; 34 L. J. (C.P.) 31. (3) 13 C. B. (N.S.) 430 ; 32 L. J. (C.P.) 89.

(2) 18 C. B. (N.S.) 722 ; 34 L. J. (C.P.) 212. (4) Law Rep. 6 C. P. 14. (5) Law Rep. 5 Ex. 204.

(6) Law Rep. 9 Q. B. 263.

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to say that the negligence of the railway company (assuming them bound to fence) contributed to the injury: *Hill v. New River Company*. (1) Neither, in any view, was there any negligence on the part of the company with respect to the plaintiff, for the obligation to fence, imposed by 8 Vict. c. 20, s. 68, exists only in favour of the owners and occupiers of the adjoining land, and is equivalent to a common law prescriptive obligation to fence: *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Wallis* (2); *Ricketts v. East and West India Docks, &c., Ry. Co.* (3); *Fawcett v. York and North Midland Ry. Co.* (4); *Bessant v. Great Western Ry. Co.* (5); there is no such obligation imposed on them as towards their passengers, still less as towards their own servants: *Buxton v. North-Eastern Ry. Co.* (6) Nor could the plaintiff be identified with the alleged negligence of the railway company; the authority of the case of *Thorogood v. Bryan* (7) has been much shaken by *Tuff v. Warman* (8), *The Milan* (9), and other cases: see Smith's Leading Cases, vol. i. p. 266, 6th ed.; and the true rule is that laid down in Shearman and Redfield on Negligence, p. 48, § 46: "Where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control, or that he controlled the plaintiff's personal conduct." (10)

[POLLOCK, B. Is it not like the case of a man riding in a friend's carriage, which is so rotten that it is broken to pieces by what would do an ordinary carriage no harm? Would he not take on himself the risk of the condition of the carriage?]

(1) 9 B. & S. 303.

(2) 14 Q. B. 213; 23 L. J. (C.P.) 85.

(3) 12 C. B. 160; 21 L. J. (C.P.) 201.

(4) 16 Q. B. 610; 20 L. J. (Q.B.) 222.

(5) 8 C. B. (N.S.) 368.

(6) Law Rep. 3 Q. B. 549.

(7) 8 C. B. 115.

(8) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263.

(9) Lush. 388; 31 L. J. (Adm.) 105.

(10) The case cited in support of this proposition is *Eaton v. Boston and*

*Lowell Railway Company* (11 Allen R. 500), which was an action brought by a passenger against the carriers in respect of an accident caused by the joint negligence of the defendants and another company using their line under running powers. The defendants in effect asked the judge to rule that the concurrence of the negligence of others in causing the accident prevented the plaintiff from recovering against them, and the refusal of the judge so to rule was upheld by the Court

There seems no more reason why he should take the risk of an ill-constructed carriage than of a negligent driver. But, lastly, the railway company was guilty of no negligence; for pigs are not included in the term "cattle" in 8 Vict. c. 20, s. 68. It must be admitted that they are within the definition of cattle as given in the dictionaries of Webster and Richardson (1), but they are not commonly spoken of as cattle; they are not domesticated to the same degree as the creatures which are commonly called cattle; nor are they so frequently fed in fields; and it is therefore unlikely that they were meant to be included.

*Lanyon* (*Thestiger*, Q.C., with him), for the defendant, was not called on.

BRAMWELL, B. I am of opinion that this rule must be made absolute. By s. 68 of the Railways Clauses Consolidation Act, 1845, the railway company is bound to make a sufficient fence for the protection of the adjoining landowner. [The learned judge read the section, and proceeded:—] The fence is to be sufficient for two purposes, for separating the land taken for the use of the railway from the adjoining lands not taken, and for "protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." The company were therefore bound to fence against the defendant's cattle, and I think the word "cattle" in this section is sufficiently comprehensive to include pigs. Now the fence was not sufficient to prevent the defendant's pigs from trespassing, and it would seem to follow that the railway company must be liable for the consequence of the pigs escaping through it. But it does not follow as a consequence that they would be liable for any mischief done by any pig escaping on to the line through a defective fence. Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock

(1) These definitions are as follows:—Webster: "Cattle—beasts or quadrupeds in general, serving for tillage, or other labor, and for food to man," and the word is said to include "perhaps swine." Richardson: "Cattle—kine, horses, and some other

animals appropriated to the use of man;" and the following lines are quoted from Ben Jonson:—

"Th' ignoble never lived, they were awhile,  
Like swine or other cattell, here on earth."

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could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it. Now here the pigs had crawled underneath the fence before, and the owner of the adjoining field had been warned of it. It is plain, therefore, that the fence was not sufficient, and in my judgment the company could clearly not have maintained any action against the owner of the pigs for trespass, and probably he might have maintained an action against them for any injury to the pigs through their getting on the line. At any rate, without saying how this might be, the fence was not sufficient.

The pigs then got upon the line through an insufficient fence, and caused injury to the plaintiff, and the question arises, is the defendant liable? What might happen if one of the public were injured in the use of the railway, which is a public highway, I will not say. The defendant might perhaps say, "I was not bound to fence;" but then the plaintiff might reply, "There was an opening through which you knew the pigs might get out of your field upon the line; you allowed them to be in the field, and I, using the road innocently, suffered injury through their escaping on to the line." But however that might be, here the plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs got on to that unfenced property through its owner's default, the owner could not maintain an action; and, if so, it is impossible to say that a third person, using the property through the licence of the owner, and on his behalf, can. The servant can be in no better position than the master, when he is using the master's property for the master's purposes. Therefore, without saying anything as to the decision in *Thorogood v. Bryan* (1) it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant.

(1) 8 C. B. 115.

PIGOTT, B. I am of the same opinion. The Railways Clauses Act, 1845, s. 68, commences with the words "the company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway;" the railway company then are to do the things mentioned, instead of the owners and occupiers. Then what are those things? They are to make and maintain "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." Now, one need only consider the state of things produced by the making of a railway through an estate, to see how reasonable it is that the owner, who is compelled to part with a portion of his land to the railway, should be relieved of the new and unlimited responsibility which would be otherwise cast on him of keeping in his cattle against the railway company and the passengers by their line. The reason of the thing certainly applies as much to swine as to other animals; but it is said the word "cattle" used in the Act does not include them. Certainly, however, they are such animals as are commonly to be found kept like other cattle in the fields, in some parts of the country almost as commonly as sheep, in other places at particular seasons of the year. I see no reason for excluding them from the provision, and I think the word is wide enough to include them. I agree that the company are not bound to fence against animals of extraordinary capacities or under unusual conditions; but they must have a fence sufficient against ordinary cattle. Now here, the finding is, in effect, that the fence was sufficient against other cattle, but not against swine. It was therefore not a sufficient fence within the meaning of the Act. The defendant then, it not being shewn that he has been guilty of any negligence, is not responsible to the plaintiff for the accident which has occurred.

POLLOCK, B. I am of the same opinion. It is unnecessary to discuss *Fletcher v. Rylands* (1), or *Hill v. New River Company* (2), where it was held that the defendants were liable because the

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(1) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.

(2) 9 B. &amp; S. 303.



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proximate cause of the injury was brought about by their negligence, and that they could not better their position by saying that the result would not have been so mischievous if the negligence of another person had not concurred to cause it; because here it is clear the injury to the plaintiff was caused by the want of a sufficient fence. It is clear also, as my brother Bramwell has said, that the railway company could not have maintained any action against the defendant in respect of trespass by the defendant's pigs. But it is contended that nevertheless the plaintiff can, and that he ought not to be considered as identified with the company. If the case were within the passage cited from Shearman and Redfield this might be open to doubt, but that passage has no application to the present case, where the plaintiff met with his injury through being upon premises originally insufficiently protected by those in whose employment he was. This takes it out of the proposition laid down in the passage cited, and makes the case resemble the one I put during the argument, of a person riding in another person's carriage, which is so rotten that a blow by some passing vehicle, which would have no such effect if the carriage were sound, breaks it in pieces. I think, that in such a case, the person riding in the carriage would be identified with the carriage in which he was riding. So here, the plaintiff is identified with the land which he was using for his own convenience; and that as the defective condition of that land, which was due to the owner's neglect, was the cause of the accident, the plaintiff cannot sue the defendant for the injury.

*Rule absolute.*

Attorney for plaintiff: *Christmas.*

Attorney for defendant: *Bromley, for Veley & Cunningham, Braintree.*

## [IN THE EXCHEQUER CHAMBER.]

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May 14.

DANIEL AND ANOTHER v. STEPNEY AND ANOTHER.

*Landlord and Tenant—Rent-charge—Distress upon Lands not included in the Demise—Mines—Notice.*

Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns." The plaintiffs, being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees:—

*Held*, that, whether the power was or was not a valid power of distress against strangers, the plaintiffs, taking as assignees with notice, were bound by it.

ERROR on the judgment of the Court of Exchequer in favour of the plaintiff on a demurrer to the defendants' plea.

After the judgment below was pronounced, as reported (1), the plea was amended, and (the parties intending to carry the case to the Exchequer Chamber) judgment was given without argument for the plaintiffs on a demurrer to the amended plea.

The case was argued in the Exchequer Chamber in the sittings after Hilary Term, 1873, and the case stood over for the defendants to apply at Chambers for leave to make certain suggested amendments. Leave to make these amendments was refused, and the case was re-argued.

The pleadings as they now stood were as follows:—

Declaration: 1st count, for entering plaintiffs' lands and taking and carrying away fixtures and goods of the plaintiffs, and disposing of the same to defendants' use.

2nd count, trespass de bonis asportatis.

Plea, on equitable grounds, that the lands mentioned in the first count of the declaration were the lands called "Carnarvon" in the lease thereafter set forth; that at the time of the alleged

(1) Law Rep. 7 Ex. 327, where the pleadings, as they then stood, are set out.

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trespasses there were in the said lands, pits communicating with mines lying under certain lands of the defendant Stepney (called in the said lease the "described lands") and adjoining the lands in which, &c.; that at the time of granting the said lease Thomas Harries and others were possessed of the lands in which, &c., and of the mines and collieries under the same, for a term still unexpired, and were desirous of extending the workings and mines from those lands to the coal and culm under the said land of Stepney, adjoining the lands in which, &c., and more particularly described in the said lease, and Stepney, before the alleged trespasses, by deed leased the last-mentioned coal and culm to the said Thomas Harries, &c.

The plea then set out the lease, alleging it to be executed by the lessees, by which the defendant Stepney demised to Thomas Harries and others, for a term of forty years, the coal and culm under certain lands thereafter referred to as "the said described lands," with liberty to dig pits for winning and working the same, and also with liberty to bring minerals and substances underground from any workings for the time being in their occupation under adjoining or neighbouring lands, for the purpose of bringing the same to bank on the "described lands," with certain surface rights accessory thereto; and also with liberty to win and work the demised coal by means of workings under the adjoining lands called "Carnarvon," then in the occupation of the lessees, and the pits sunk, or to be sunk, on such adjoining lands; paying a surface rent for land used, and a sleeping rent and royalty in respect of the coal and culm, and a way-leave for coal got under other lands and brought to bank on the "described lands;" with a covenant by the lessees to indemnify the lessor against any claims (if any should or could be made) by persons interested in any adjoining or neighbouring lands by reason of acts or omissions of the lessees in respect of getting, laying, or disposing of the demised minerals in or upon such lands; and with a proviso that if any of the reserved rents, royalties, or way-leaves should be unpaid for twenty-one days after they should become due, the reversioner or reversioners might stop and hinder the loading and sending of any coal, culm, materials, or things from off the said premises, including as well the said "described lands,"

as also any lands other than the described lands in which there should for the time being be any pits or openings by or through which the coal and culm thereby demised, or any part thereof, should for the time being be in course of working by the lessees, their executors, administrators, or assigns, and for that purpose, and for the purpose of distraining, as thereafter mentioned, to enter into such other lands as well as the said described lands, and also to distrain all and every or any of the coal, culm, or materials, and also the horses, gins, &c., live and dead stock, materials, goods, chattels, and effects, standing and being, or used or employed in, upon, under, about, or in connection with, or as accessory to the coal and culm thereby demised, or any part or parts thereof, or in or upon any railway or tramway connected with any of the premises, and the distress and distresses then and there found to take, lead, and carry away, and to sell and dispose of the same, and generally to demand, in like manner as in cases of distress for rent reserved in common leases for years, and thereout to satisfy the arrears and costs.

The plea then stated that the lands described in the lease as "lands other than the described lands" referred to the lands in which, &c., and in which the said Thomas Harries and others, at the time of the demise, and the plaintiffs at the time of the alleged trespasses, had pits through which the said demised coal and culm could be most advantageously and easily worked; that certain of the rents, royalties, and way-leaves became in arrear for twenty-one days, and whilst they were unpaid, and before the alleged trespasses, the lessees assigned their interest in the lease, and in the lands in which, &c., to the plaintiffs in trust for the benefit of creditors.

The plea then set out the deed (which conveyed and assigned the whole property of the debtors), and proceeded to state that, save under the said deed, the plaintiffs never had any interest in or possession of the lands in which, &c., or the goods thereafter mentioned; that at the time of making the said deed the plaintiffs had notice and knowledge of the said lease, and of the covenants, provisions, and terms therein contained; that whilst the plaintiffs were such trustees as aforesaid, and possessed as aforesaid, and because the said rent was still due and unpaid, and

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in exercise of the rights granted by the said Thomas Harries and others as aforesaid, the defendant Stepney in his own right, and the defendant Rosser, as the servant and bailiff of Stepney, entered the lands in which, &c., the same being lands then used in connection with or as accessory to the said demised coal and culm, being parcel of the said adjoining lands called Carnarvon, and being the lands other than the said described lands referred to in the lease, and then being in all respects lands liable to the distress thereafter mentioned, for the purpose of distraining for the said rent so due, and did then distrain therefor certain coal-waggons, carts, and other chattels and distrainable things, the same being then in the possession of the plaintiffs by virtue of, and which vested in them under and by virtue of the said assignment, and standing and being, or used and employed, in connection with the said works, in or upon the said lands in which, &c., doing no more than was necessary in that behalf, which are the alleged trespasses, &c., in the declaration mentioned.

Demurrer and joinder.

*Joshua Williams, Q.C. (Giffard, Q.C., Herschell, Q.C., and Trevelyan with him)*, for the defendants, contended that the power of distress contained in the lease was valid at common law; and cited Co. Litt. 147 a.; *Butt's Case* (1); Bacon's Maxims, Comments on Reg. 14; Fearn, p. 528; Jarman's Bythewood, vol. iv., p. 162; *Locke v. Darley* (2); *Allerson v. Eden* (3); *Corbet's Case* (4); *Allen v. Givers* (5); *Casamajor v. Strode* (6); but that if not valid so as to affect third persons whose goods might be seized under it, it was valid in equity as against the plaintiffs, who took as assignees with notice, citing *Staines v. Morris* (7); *Tulk v. Moxhay* (8); *Parker v. Whyte* (9); *Clements v. Welles* (10); Sugd. Vendors and Purchasers, 14th ed., app. 1, p. 799.

The Court then called on

*Manisty, Q.C. (Murphy, Q.C., and Beresford with him)*, for the

(1) 7 Co. Rep. 23.

(7) 1 V. & B. 8.

(2) 2 Dr. & W. 256.

(8) 2 Ph. 774.

(3) Noy, 5.

(9) 1 H. & M. 167; 32 L. J. (Ch.)

(4) 1 Co. Rep. 83 b.; at p. 87.

520.

(5) Moor, 179, 185.

(10) Law Rep. 1 Eq. 200.

(6) 2 Sw. 347, at p. 357.

plaintiffs, who, without arguing the first point, referred to *McLean* v. *McKay* (1), and admitted that on the second point he could not maintain the plaintiffs' contention.

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PER CURIAM (Cockburn, C.J., Blackburn, Keating, Mellor, Lush, and Denman, JJ.). We had all arrived at the conclusion that the judgment below must be reversed.

*Judgment reversed.*

Attorney for plaintiffs: *Hacon*.

Attorney for defendants: *Calcott*.

(1) Law Rep. 5 P. C. 327.

END OF EASTER TERM, 1874.

## CASES

DETERMINED BY THE

## COURT OF EXCHEQUER,

AND BY THE

## COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXVII VICTORIA.

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June 1.

WOOD *v.* WOAD AND OTHERS.*Mutual Insurance Society—Partnership—Wrongful Expulsion.*

Declaration, alleging that the plaintiff was a member of a mutual insurance society, which insured members against losses to ships entered and insured in the books of the society, on a deposit being made of 5*l.* per cent. on the amount insured; that the defendants were the committee of the society, by the rules of which they had the entire control of the funds and affairs of the society, and were to determine on the admission or rejection of ships insured or proposed for insurance; that by another rule, "if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from the society, and, after the giving of such notice, such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice;" that the plaintiff, as such member, had entered a ship on the books of the society, and had paid the deposit, and was thereupon entitled to an indemnity for loss happening to the ship; that the defendants, well knowing the premises, but "wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity, did wrongfully, collusively, and improperly expel the plaintiff from the society on the alleged ground that his conduct was suspicious, or that he was for some reason unworthy of remaining in the society, without giving the plaintiff, or any person on his behalf, any opportunity whatsoever of being heard before them,

and without, in fact, hearing the plaintiff, or any person on his behalf, in defence and vindication of the plaintiff's conduct as a member of the society with reference to the said ground of expulsion"; whereby the plaintiff lost the benefit of an indemnity for damage which his ship subsequently sustained, and was otherwise damnified. Demurrer:—

*Held*, that the declaration shewed no cause of action.

By Kelly, C.B., Pollock and Amphlett, BB. (following *Blisset v. Daniel*, 10 Hare, 493), on the ground that, assuming the allegations of the declaration to be true, the act of the defendants in expelling the plaintiff without giving him an opportunity of being heard was void; that the plaintiff, therefore, still remained a member of the society, and had sustained no damage.

By Cleasby and Pollock, BB., on the ground that the declaration did not sufficiently charge *mala fides*.

*Quære*, by Cleasby and Amphlett, BB., whether any action would lie against the defendants for acts done by them in the discharge of their functions as members of the committee.

DECLARATION, that the plaintiff was a member of a mutual marine insurance association or club, called the Goole Marine Insurance Society, which had been formed and was carried on for the purpose of mutually insuring and indemnifying the members against losses and damages by the perils of the seas, rivers, navigations, and waters, enemies, pirates, jettisons other than that occurring to deck cargo, and fires happening to or done by their respective vessels and parts of vessels entered or insured respectively by them in the books of the society, on deposit with the treasurer of a sum equal to 5*l.* per cent. on the amount of the sums for which such vessels should be insured, and on the terms contained in the rules of the said society; that the plaintiff, as such member, and having deposited with the treasurer such sum as aforesaid, had a certain ship or ships duly entered in the books of the society, upon and in accordance with the terms aforesaid.

That the defendants were the committee of the society, and that one of the rules of the society was as follows, viz. "That the management of the affairs of this society shall be at all times hereafter conducted by a committee of not less than nine persons (either members of the society or not), one of whom shall be appointed president of the society; that such committee shall have the entire control of the funds, affairs, and concerns of the society; and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it, and such determination shall be entered by the secre-

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tary in the books of the society, and be final and binding upon all parties unless where they afterwards see cause to alter and do alter the same; provided that no member of the committee shall act as such in the settlement of his own loss. That the ordinary meetings of the committee shall be held in the first week of every month at Goole, on such day and hour as the president for the time being shall determine. That a majority of the committee present at any meeting shall have full power to act, provided that such majority do not consist of less than three in number."

That another rule of the society was as follows, viz. "that if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member by directing the secretary to give such member notice in writing that the committee have excluded such member from the society, and after the giving of such notice such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice."

That the plaintiff, as such member as aforesaid, and having deposited with the treasurer of the society such sum as aforesaid, and having his ship or ships entered on the books of the society as aforesaid, was under and in accordance with the rules of the said society entitled to receive, and but for the grievances hereinafter mentioned would have received, from the funds of the society an indemnity for any loss or damage happening to his said ship or ships so entered as aforesaid, by the perils of the seas, &c., during his membership.

Yet the defendants, well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity as aforesaid, did wrongfully, collusively, and improperly expel the plaintiff from the said society on the alleged ground that his conduct was suspicious, or that he was for some reason unworthy of remaining in the society, without any just, reasonable, or probable cause whatsoever for such expulsion; and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon by the said

committee, and without giving the plaintiff, or any person or persons on his behalf, any opportunity whatsoever of being heard before them, and without, in fact, hearing the plaintiff, or any person or persons on his behalf, in defence and vindication of the plaintiff's conduct as a member of the said society with reference to the said ground of expulsion.

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That before and at the time of his said expulsion from the society, the plaintiff had a certain ship called the *Progress* duly entered in the books of the society, and had deposited with the treasurer of the society such sum as aforesaid, and the said ship sustained certain damage by the perils of the seas a few days after the said expulsion of the plaintiff from the society, and but for the said expulsion he would have been entitled to receive and would have received 92*l.* 2*s.* 8*d.* from the funds of the society as an indemnity for the said damage so sustained as aforesaid, and that by reason of his said expulsion he has lost the said sum of 92*l.* 2*s.* 8*d.*, and has been otherwise, by reason of the said wrong of the defendants, greatly damnified and injured.

Demurrer and joinder.

The defendants also pleaded pleas raising issues of fact. On the cause coming on for trial before Pollock, B., at the Leeds Spring Assizes, 1874, the learned judge nonsuited the plaintiff, on the ground that the facts stated in the declaration shewed no cause of action.

A rule was afterwards obtained to set aside the nonsuit and for a new trial. This rule raised the same points as the demurrer, and judgment on the rule stood over till after argument of the demurrer.

*Waddy, Q.C. (S. Tennant with him)*, in support of the demurrer. First, the committee had an absolute and unappealable power of expulsion; a discretionary power had been reposed in them by the partners, including the plaintiff himself, of an extreme kind, it must be admitted, but one necessary for the conduct of the co-partnership business; and to hold that they could be sued in respect of the manner in which they exercised their functions would practically destroy the benefits for the sake of which the power was conferred. In effect this is an action between partners

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which a court of common law will not entertain. Secondly, the plaintiff has suffered no damage. The damage alleged is that the plaintiff, in consequence of his expulsion by the defendants, lost the compensation which he would have recovered in respect of injuries sustained by his ship *Progress*. But he could have maintained no claim in respect of these injuries unless a policy had been executed: *Smith's Case* (1); *Fisher v. Liverpool Marine Insurance Co.* (2); and it is nowhere alleged in the declaration that any such policy had been executed.

[KELLY, C.B. The declaration alleges that the plaintiff paid a sum of money for the privileges of membership, and that he was improperly expelled, and alleges general damage.]

Assuming that such damage would be sufficient to support the action if the declaration shewed a fraudulent exercise of their power by the committee, the allegations fall short of this. No word is used implying fraud; the word "collusively" is insufficient.

[AMPHLETT, B. Apart from the word "collusively," if the allegations in the declaration are true, it would appear that the attempted expulsion of the plaintiff was invalid, no opportunity having been afforded him for explanation: *Blisset v. Daniel* (3); if so the plaintiff is still a member, and he has suffered no damage.]

*Digby Seymour, Q.C.*, (Lewers with him), contra. The word "collusively" imports fraud: *Batterbury v. Vyse*. (4)

[AMPHLETT, B., referred to *Gill v. Continental Union Gas Co.* (5)]

Even if by itself the word does not import fraud, there is sufficient in the context to give it that meaning. Admitting that the committee have a discretionary power, their discretion must be exercised honestly, and if by a fraudulent use of their power the plaintiff is injured, the action lies. Actual specific damage is sufficiently alleged, for it must be assumed that whatever was legally necessary to entitle the plaintiff to make a valid claim for compensation for his loss had been done. But, apart from

(1) Law Rep. 4 Ch. 611.

(2) Law Rep. 8 Q. B. 469; affirmed,  
Law Rep. 9 Q. B. 418.

(3) 10 Hare, 493.

(4) 2 H. & C. 42; 32 L. J. (Ex.) 177.

(5) Law Rep. 7 Ex. 332, at p. 337.

this, the unjustifiable and improper expulsion of the plaintiff from the society is in itself legal damage; and that the expulsion was improper is shewn by the admitted fact, that no opportunity was given to the plaintiff to be heard in his defence: *Rex v. Cambridge University (Dr. Bentley's Case)* (1); *Rooke's Case* (2); *Ex parte Ramshay*. (3)

[CLEASBY, B., referred to *Reg. v. Archbishop of Canterbury* (4) and *In re Hammersmith Rent Charge*. (5)]

[POLLOCK, B. How do you meet the difficulty, that if the allegations in the declaration are true, the attempted expulsion was void, and the plaintiff's position was unaltered?]

The attempt itself was injurious; it would entail on the plaintiff the necessity of filing a bill in Chancery to restore him to the enjoyment of his rights: *Dixon v. Fawcus*. (6)

[KELLY, C.B., referred to *Beaurain v. Scott*. (7)]

*Tennant*, in reply.

KELLY, C.B. [after stating the declaration, proceeded]. The question is whether this count can be sustained, and I am of opinion that it cannot. But I do not proceed on the ground that the committee are in any way justified in what they did. The allegation is that the plaintiff was expelled without any opportunity being given him of being heard in his defence or of shewing that there was no ground of suspicion against him, nor anything which would make him unworthy of remaining a member. I am of opinion that before the committee could be justified in giving him notice of expulsion they were bound to give him this opportunity, and if the case rested there, and but for the considerations to which I am about to refer, I think the plaintiff would be entitled to maintain his action. But when we look at the nature of the act of expulsion, it is plain that its effect, if it had any, was to cause the plaintiff to cease to be a member of the co-partnership, and to deprive him of any rights, privileges, and benefits which he would have been entitled to under its rules. Now whether it has that

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(1) 1 Str. 557.

(2) 5 Co. 99, 100.

(3) 18 Q. B. 173, at p. 190; 21 L. J. (Q.B.) 238.

(4) 1 E. & E. 545; 28 L. J. (Q.B.) 154.

(5) 4 Ex. 87; 19 L. J. (Ex.) 66.

(6) 3 E. & E. 537; 30 L. J. (Q.B.) 137.

(7) 3 Camp. 388.



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effect depends altogether upon whether by the so-called expulsion he ceased to be a member, and the contention of the defendants is that, if (as the plaintiff alleges) the act of expulsion was unjustifiable and unlawful for the reasons already mentioned, it was void, the plaintiff did not cease to be a partner, but is still entitled to enforce the rights of a partner against the association, notwithstanding the act by which it has been sought to deprive him of them.

This, then, is the great question in the case: was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any Court. But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. In the case of *In re Hammersmith Rent Charge* (1), Parke, B., though in that particular instance he dissented from the judgment of the majority, laid down principles which were not questioned, "It has long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding unless he has had an opportunity of being heard." After referring to several circumstances the learned judge goes on: "In *Capel v. Child* (2) Bayley, B., says that he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard," and then, after referring to the details of the case of *Capel v. Child*, he adds, "This is an extremely strong case, and shows how powerful the principle of justice is in all judicial pro-

(1) 4 Ex. 87, at p. 97.

(2) 2 C. & J. 558, at p. 579.

ceedings: Qui statuit aliquid parte inauditâ alterâ, Æquum licet statuerit, haud æquus fuit." (1) I entirely adopt this language and I apply it to the present case.

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I come next to the case of *Blisset v. Daniel* (2), referred to by my brother Amphlett, which is almost identical with the case before us. The marginal note to that case states as follows: "Articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner by giving him notice thereof under their hands in the form thereby prescribed; and that immediately after giving such notice a notice of the dissolution as to the expelled partner should be signed by the partners and published; with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided that if a partner became bankrupt, insolvent, or was expelled, his interest should cease as to profit and loss as if he had died on the day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided that the shares of retired, deceased, bankrupt, insolvent, or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided that in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel." Then (omitting certain details as to the mode of assessing the value of shares which it is unnecessary to refer to), the note goes on: "*Held*, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract. That such a power must be understood to exist, not for the benefit of any particular partners holding two-thirds or more of the shares, but for the benefit of the

(1) *Seneca, Med. v.* 199, 200.(2) 10 *Hare*, 493.

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whole society or partnership. That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value." So far, I entirely agree with what is laid down, and I think it applicable to this case because, in my opinion, there is enough on this record to show a collusive and unlawful exercise of power on the part of the committee. The note goes on: "That the power was not properly exercised at the exclusive instance of one partner, and, in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners." Now, on the most favourable state of circumstances that can be imagined for the committee, supposing there was a complaint before them which would afford a just ground of suspicion, supposing that conduct had been proved against the plaintiff which would, if unexplained, shew him to be unworthy to continue a member of the society, yet this decision is in point to shew that it was incumbent on them to give the partner the opportunity of stating his case, and that to act without giving him that opportunity was wholly wrongful and unlawful. The decision, therefore, is clearly in point; it establishes that the act being wholly wrongful and unlawful it had no legal effect; it was absolutely void, and did not cause the plaintiff to cease to be a member of the partnership. This appears clearly by the form of the decree in *Blisset v. Daniel* (1): "Declare that the notice of expulsion given to the plaintiff on [the 20th of August, 1850, was void, and that the plaintiff did not by virtue thereof cease to be a partner in the co-partnership firm of John Freeman's Copper Company," and accounts were accordingly directed on that footing. And so I apprehend it is here. The claim in this action is for damages sustained by reason of the expulsion of the plaintiff from the association; but in law the plaintiff has sustained no damage at all, for whatever rights he may have possessed before he possesses still, as if no act had been done calculated to deprive him of them.

I must add one word on the case of *Beaurain v. Scott* (2), which,

(1) 10 Hare, at p. 538.

(2) 3 Camp. 388.

from my imperfect remembrance of the case, I was in hopes might have assisted the plaintiff by shewing that, though the act of expulsion was void, yet, being wrongful and unlawful, the plaintiff might maintain an action for damages, though there was no actual loss. But, on referring to that case, I find that the act there done was an exercise of judicial authority, the pronouncing of a decree of excommunication in an Ecclesiastical Court, which, if done without jurisdiction, is an indictable offence, and is of so important a nature as to inflict damage in law without more. Besides which, the additional fact occurred there that the excommunication was publicly read, during divine service, in the plaintiff's parish church. Under these circumstances, it was held that an action would lie, although the sentence was without jurisdiction, and therefore void. The case here is totally different.

Therefore, although I should be glad to feel at liberty to decide otherwise, I come to the conclusion that the act of expulsion was really of no effect at all, that the plaintiff might have altogether disregarded it, and that he cannot maintain this action against the defendants.

For the same reasons the rule to set aside the nonsuit must be discharged.

CLEASBY, B. I have arrived at the same conclusion, though not precisely upon the same grounds. I do not proceed on the ground that there was an absence of damage, because I should have thought that the rule applied that wherever there is a wrong there is in law a damage; and that if the plaintiff was entitled to be a member, the de facto exclusion of him (for, by the rules, from the moment of notice being served on him he would have no claim on the association) would give him a right to maintain an action. But I must say that I am not satisfied that under the circumstances of the present case the committee are liable to the plaintiff for the manner in which they exercised their functions. It is to be observed that the declaration states that the committee expelled the plaintiff "without any just, reasonable, or probable cause whatsoever for such expulsion, and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon." Now, we may suppose either that the com-

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mittee expelled the plaintiff without just cause and without giving him notice, or that they expelled him without just cause but did give him notice; and the declaration is framed so as to comprehend in the breach both modes of wrongful expulsion. Assuming, however, that we are to take it that the committee expelled him without just cause and gave no notice, I still doubt whether this is any ground for an action. It appears that by one of the rules the committee is to have "the entire control of the funds, affairs, and concerns of the society, and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it," and their decision is to be final and binding on all parties, unless when they afterwards see cause to alter and do alter the same. Now are these persons liable in respect of the manner in which they act in the discharge of their duties, and in respect of any negligence or irregularity they may commit in so acting? Suppose they refuse to admit of a ship being entered which a member of the society proposes for insurance, are they liable to be sued for improperly rejecting it? And similarly, if a claim is made in respect of a loss, are they liable to be sued by any disappointed person in respect of their settlement of the claim? This is not the question of whether there is a remedy in Chancery, which might be open to different considerations, but whether there is a right of action. They are to act on "suspicion." This is ordinarily a most unsafe ground to act upon, but here, from the nature of the case, it is deemed essential that they should so act. The result of their determination is not to be considered as a decree or judgment, but as an exercise of discretion; and can we try the question of whether their "suspicion" was just and reasonable? I do not think their office exposes them to an action on the case for their conduct in executing it. Therefore, if the question was whether fraud would give a ground of action, I should be reluctant to pronounce that it would do so.

But, in the second place, I have no hesitation in saying that the declaration omitting the word "fraudulently" is intentionally framed so as not to place the plaintiff in the position of being compelled to prove *mala fides*, and on this ground I think the nonsuit was right. Fraud is not made the gravamen of the complaint. The word "collusively" is a loose expression which does

not necessarily import mala fides. In *Batterbury v. Vyse* (1) the collusion alleged involved a charge of a particular and specific nature, because the party who had employed the plaintiff had undertaken to pay him only on the certificate of the architect; and the plaintiff alleged that the defendant, colluding with the architect, procured him to withhold his certificate. There was therefore a particular and specific act charged, an act done by his procurement. That case, therefore, is no authority for giving the word "collusively," as used here, a sense importing fraud. On that ground, it appears to me that we ought not to hold that a cause of action is alleged in this declaration, even if any action could be maintained at all in respect of the acts of the committee.

On the first ground I do not express a decided opinion, but on the second I concur in giving judgment for the defendants.

POLLOCK, B. I am also of opinion that the defendants are entitled to judgment. The case is one involving several important principles of law, and in which those principles are a good deal taxed in their application.

In the first place, I think there is no force in the defendants' objection that the plaintiff failed to shew a cause of action because he did not shew that he had a ship insured. The allegation that he was a member of the association and had paid his money for the benefits belonging to that membership, is quite enough to give him an interest sufficient to maintain this action, if on other grounds he can maintain it.

In the second place, I think there is nothing in the point that this is a co-partnership; because, although as between the plaintiff and the whole body of members the objection would prevail, and the plaintiff must resort to equity for relief, yet it is competent to him to bring his action against these twenty defendants, who are, as it were, taken out of the partnership to form a committee for the management of the partnership affairs, if they are guilty of a wrongful act which substantially affects the plaintiff's position.

Then the question is, Does the substance of the declaration shew a legal cause of action? It alleges that the defendants did wrongfully, collusively, and improperly expel the plaintiff from

(1) 2 H. & C. 42; 32 L. J. (Ex.) 177.

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the said society. Now, it is conceded that the word "expelled" does not mean a physical expulsion, but is used to express what the committee did when they served the plaintiff with the notice that they had excluded him. But to say that merely passing a resolution to exclude or serving a notice of exclusion is, under the circumstances, so improper an act as to be contrary to a nice sense of justice, or even to entitle the plaintiff to proceed against the whole body to enforce his rights as a partner is one thing; to say that it would entitle him to bring an action against those who were guilty of that improper act is quite another. And, though I am not quite clear as to this, upon the whole I think the allegations in the declaration are not sufficient to cover what the plaintiff is bound to establish in this action, and what the declaration would have bound him to establish if he had used the word "fraud." The word "collusive" may be used in the sense of "fraudulent;" but if the pleader chooses to use words of a doubtful meaning, they must be taken most strongly against him. Otherwise the plaintiff, on going down to trial, would put a proposition of doubtful meaning before the jury.

But suppose the plaintiff right as to that; still the difficulty remains that the declaration merely amounts to this, that what the defendants have done is a void act, and if so, where is the damage to the plaintiff? Can it be said that we have here a legal right infringed within the principle of *Ashby v. White* (1), so as to entitle the plaintiff to maintain an action for the bare infringement? It may be that there are cases where the plaintiff, charging something in the nature of a conspiracy, might maintain an action without proof of actual damage. There may be such cases; but they are peculiar and do not apply here. The act is a void act, and the plaintiff still remains a member of the society. This conclusion is in accordance with *Blisset v. Daniel* (2), and with *Innes v. Wylie* (3), which was cited on the trial, where, on a declaration charging the defendant with having excluded the plaintiff from the Caledonian Society, Lord Denman ruled that the plaintiff was in the position in which I have said the plaintiff is here; if the expulsion was wrongful, then, since it was merely a void act,

(1) 2 Ld. Raym. 938.

(2) 10 Hare, 493.

(3) 1 C. &amp; K. 257.

the plaintiff was still a member of the society. I think, therefore, that the defendants are entitled to judgment. And with respect to the rule for a new trial, I think the declaration was purposely framed to bring before the jury a case which could not properly be brought before them, and that the nonsuit should stand.

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AMPHLETT, B. I am of the same opinion, and should have added nothing, but that the diversity of opinion as to the grounds of judgment make it necessary for me to state the grounds on which I proceed.

It has throughout appeared to me that the question was, whether or not the plaintiff did, in consequence of the act of the defendants, cease to be a member of the partnership. If not, then no wrong was really done to him for which he can recover damages, for he continues a partner. But if his expulsion had been effected, but by fraudulent means, then no doubt a great injustice would have been done, and one for which he would, in my judgment, be entitled to recover. And I anticipated that it might have been argued for the plaintiff that the members of the partnership had agreed to give the committee a plenary power, and that when they came to the conclusion (having power to do so on mere suspicion) that a member should no longer continue such, then, however wrong or improper their conduct in arriving at that conclusion might be, the expulsion was complete, and that member was no longer a member of the partnership. If that had been so, then I think the allegations in the declaration would have been sufficient to make it good; for though the word "fraudulently" is not used yet it is said that "the defendants well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity as aforesaid, did wrongfully, collusively, and improperly expel the plaintiff from the said society;" and (but for the doubts expressed by my learned Brothers) I should not have doubted that this allegation was amply sufficient to support the action. But the case comes to this, that the plaintiff has, according to the allegation in the declaration, been expelled collusively and without giving him the opportunity of explanation; and it is impossible to hold that the co-partnership



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could get any benefit from the fraudulent conduct of the committee or an improper and collusive exercise of their authority. Or, taking the specific allegation of the declaration, could the committee be justified in any case in expelling a member by "deeming his conduct to be suspicious," without communicating with him and giving him the opportunity of removing the suspicion? Now, the case of *Blisset v. Daniel* (1) is express upon this point. There it was in the power of two-thirds of the partners to exclude any partner without cause assigned; but their exercise of this power was held to be invalid because it was not done *bonâ fide*. It was held that they ought to have given the partner an opportunity of being heard, otherwise one person might have conceived a prejudice against him, and might behind his back have impressed the minds of others with the same prejudice and prevailed on them to act upon it; whereas, if he had been heard, he might have removed the unfavourable impression. And it was said by the Court that if, the day after their exercise of this power was declared invalid, they should meet again and, after giving the man a proper hearing, should pass the same resolution, and the Court were satisfied that it was done *bonâ fide*, and not out of revenge because the plaintiff had filed the bill, the Court would not interfere. Now, according to the allegations in the declaration, the defendants never gave the plaintiff that opportunity, and I cannot entertain a doubt that if this allegation were proved, the plaintiff would, by filing a bill in a court of equity, be restored to the enjoyment of his rights. But if so, what is his damage? He has not ceased to be a member of the society; he has not lost the rights of a member. He is to recover damages for what? For an attempt to expel.

Further (though this is not the ground of my decision), it would be very inconvenient to try the question whether the plaintiff was rightfully expelled in the absence of the numerous other partners who are interested in having the question investigated. This ought not to be left out of consideration, because the Courts have refused to entertain actions between partners very much on that ground. If the Court cannot do complete justice, it will not entertain the action. The same ground of inconvenience applies

(1) 10 Hare, 493.

here. Moreover, I should be surprised to find that the plaintiff could both file his bill in Chancery against the society to enforce a restoration to his rights, and also recover damages in an action at law against the defendants. The result is, that if the allegations in the declaration are true, the plaintiff has never been effectually expelled, and if not expelled he has no cause of action.

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*Judgment for the defendants on the demurrer,  
and rule discharged.*

Attorney for plaintiff: *Eley*.

Attorneys for defendants: *Williamson, Hill, & Co.*

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HERMITAGE v. KILPIN.

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 May 26.

*Debtors Act, 1869, s. 5—Order of Commitment—Lapse of more than one Year  
between Order and Arrest—Common Law Procedure Act, 1852, s. 124.*

An order of commitment by a superior court under the Debtor's Act, 1869, s. 5, need not be executed within a year from its date, but remains in force as long as the judgment which it is issued to enforce.

IN this case judgment by default was signed for 30*l.* 17*s.* 1*d.* on the 2nd of January, 1872. On the 23rd of April, 1873, Martin, B., made an order of commitment for six weeks, or until payment, under the Debtors Act, 1869 (30 & 31 Vict. c. 62), s. 5, and on the same day the order was delivered to the sheriff of Sussex. On the 21st of February, 1874, a "concurrent order" was issued directed to the sheriff of Surrey, which was dated nunc pro tunc as of the 23rd of April, 1873. The sheriff of Surrey arrested the defendant on the 8th of May, 1874. On the 9th a summons was taken out on his behalf, calling on the plaintiff to shew cause why he should not be discharged out of custody. Upon the hearing before Denman, J., at chambers the learned judge referred the matter to the court. A rule was accordingly obtained in the terms of the summons, on the ground that more than one year had elapsed between the date of the original order and the arrest.

The Debtors Act, 1869, s. 5, enacts that, "Subject to the pro-

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visions hereinafter contained and to the prescribed rules, any court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court. . . . Persons committed under this section by a superior court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal by any superior court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ." It is further enacted by the same section, that imprisonment is not to operate as satisfaction. The prescribed rules are silent as to the time during which an order of committal is to be in force.

By the Common Law Procedure Act, 1852, s. 124, it is enacted that "a writ of execution issued after the commencement of this Act, if unexecuted, shall not remain in force for more than one year from the date of such writ, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ in the manner indicated in the section.

*Arbuthnot* shewed cause. It must be admitted that the "concurrent order" must be taken to be of the same day as the original order, and the question therefore is, whether s. 124 of the Common Law Procedure Act, 1852, applies to orders of commitment under the Debtors Act, 1869. If so, the judge's order came to an end before the arrest. But the language of s. 5 of the latter Act applies only to the mode in which the order is to be issued, obeyed, and executed, and does not limit the time within which it is to be executed. There is no provision in the rules as to renewal, although in the rules made by the county courts under the section, it is expressly provided (r. 16) that "an order of commitment made under the Act shall continue in force for one year from such date, and no longer;" and the rules being silent the order is in force (as at common law a writ of *ca. sa.* would have been:

Chitty's Archbold, 12th ed. p. 528) in infinitum, or, at all events, as long as the judgment. There is no reason for applying the statutory limitation imposed on writs of ca. sa. to these orders. There is no analogy between a procedure under which the arrest was a matter of right, and operated as an extinguishment of the debt, and an order of commitment, which is in the discretion of a judge, and which does not extinguish the debt.

*Pinder*, in support of the rule. The 5th section provides not only that orders shall be issued and obeyed, but also that they shall be executed in like manner as writs of ca. sa.; and the execution of a ca. sa. must by s. 124 of the Common Law Procedure Act, 1852, be within a year, although at common law its duration was unlimited: *Simpson v. Heath*. (1) The language of the rule with regard to county court orders strengthens the defendant's contention. For the part of s. 5 relating to county court orders does not contain any similar provision as to the *execution* of such orders. An express rule was therefore necessary to limit their duration. The inconvenience of holding orders of committal unlimited would be great.

KELLY, C.B. My learned Brothers think that these orders of commitment are unlimited in duration, or, at all events, last as long as the judgment; and although the inclination of my own opinion is, that the words "executed" in s. 5 of the Debtors Act, 1869, are sufficient to indicate that the order was to be limited in time, in like manner as writs of ca. sa., I do not desire formally to dissent from their judgment.

CLEASBY, B. There is no à priori reason why we should apply the rules regulating writs of ca. sa. to orders of commitment under the Debtors Act, 1869. A writ of ca. sa. was matter of right. An order of commitment is only issued when the judge is satisfied on affidavit that a debtor has, or has since judgment had, means to pay, and has refused or neglected to do so. Again, the old writ when executed operated as a satisfaction of the debt; the order does not. The question then is, whether the new Act does expressly, or by implication, limit the duration of the order. Now

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everything is left to the "prescribed rules," which do provide for the mode of service of the summons, the hearing before the judge, the form of order, and the issue of concurrent orders; but nothing is said about the mode of execution, a part of the procedure on a ca. sa. which is treated at length in the old text-books, and deals with such questions as by whom, when, where, and how the writ was to be executed. That is left on the section itself, which provides for the order being issued, obeyed, and executed "in like manner" as a writ of ca. sa. These words, in my opinion, apply to the mode only of executing the order, and not to the time within which it is to be executed. This rule, therefore, must be discharged.

POLLOCK, B. In my opinion the language relied on by Mr. Pinder applies to the machinery of execution only. I had some doubt upon the matter when the rule was moved, but Mr. Arbuthnot has satisfied me that there is no reason why we should apply to these orders, which are new creatures of the legislature, the whole of the law applicable to the old writ of ca. sa. I think the order lasts as long as the judgment, but will come to an end when that cannot longer be enforced.

AMPHLETT, B., concurred.

*Rule discharged.*

Attorneys for plaintiff: *Robinson & Preston.*

Attorneys for defendant: *Garrard & James.*

## CROSSE v. RAW.

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June 4.

*Landlord and Tenant—Covenant to pay “Outgoings”—Duty to make Drain.*

In a lease of a house and premises by defendant to plaintiff, the plaintiff covenanted with the defendant to “bear, pay, and discharge the sewers rate, tythes, rent-charge in lieu of tythes, and all other taxes, rates, assessments, and outgoings whatsoever which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved” (excepting landlord’s property tax):—

*Held*, that the plaintiff could not recover from the defendant the expenses of making a drain, which, under 29 & 30 Vict. c. 90, s. 10, the defendant, as “owner,” might have been required by the sewer authority to make, but which the plaintiff had made under an arrangement with the defendant by which the expense was to be borne by the party liable.

SPECIAL case, stating the following facts:—

By indenture dated the 21st of October, 1865, the defendant demised to the plaintiff a house and premises, situate at Hornsey, for a term of twenty-one years from the 25th of March, 1865, at a rent of 160*l.*, “free and clear of all rates, taxes, deductions, and outgoings whatever”; the plaintiff covenanting to pay the rent reserved “free and clear of and from the sewers rate, tythes or rent-charge in lieu of tythes, and all other rates, taxes, charges, assessments, and deductions whatsoever, the landlord’s property tax only excepted,” and also during the term to “bear, pay, and discharge the sewers rate, tythes, rent-charge in lieu of tythes, and all other taxes, rates, assessments, and outgoings whatsoever which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved (except as aforesaid).”

The drainage of the plaintiff’s house consisted of a drain emptying itself into a sewer vested in the Hornsey Local Board, which emptied itself into a brook called the Moselle, and this brook fell into the river Lee.

In consequence of various proceedings restraining the Local Board from continuing to allow their sewage to flow into the river

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Lee, an Act was obtained by them (the Hornsey Local Board Act, 1871, 34 & 35 Vict. c. cxxix.), under which they proceeded to construct a sewer to connect the sewers of the district with the high-level sewer of the Metropolitan Board of Works.

This sewer ran in front of the plaintiff's house, and during its construction the clerk to the local board served the plaintiff, who occupied the house himself, with a notice calling his attention to the fact that the sewer was being constructed, and to the provisions of 29 & 30 Vict. c. 90, s. 10; but they did not serve on the "owner" any notice under that section requiring him to make a drain communicating with the sewer. (1)

In pursuance of an arrangement between the plaintiff and the defendant, a connecting drain was made by the plaintiff (with the permission of the local board), at a cost of 45*l.* 12*s.*, on the understanding that the expense should be borne by the party liable.

The question for the opinion of the Court was, whether the defendant was liable to repay to the plaintiff the sum paid by him for making the said connection.

*Prentice, Q.C.* (with him *Michael*), for the plaintiff. The question

(1) By 29 & 30 Vict. c. 90, s. 10, "If a dwellinghouse within the district of a sewer authority is without a drain, or without such drain as is sufficient for effectual drainage, the sewer authority may by notice require the owner of such house, within a reasonable time specified, to make a sufficient drain, emptying into any sewer which the sewer authority is entitled to use, and with which the owner is entitled to make a connection, so that such sewer be not more than 100 feet from the site of the house of such owner. . . . And if the person on whom such notice is served fails to comply with the same, the sewer authority may itself, at the expiration of the time specified in the notice, do the work required, and the expenses incurred by it in so doing may be recovered from such owner in a summary manner."

By the operation of 31 & 32 Vict. c. 115, s. 11; 29 & 30 Vict. c. 90, s. 14; and 18 & 19 Vict. c. 121, s. 3, "the word 'owner' includes any person receiving the rents of the property in respect of which that word is used from the occupier of such property."

It was among the points in the present case that the plaintiff's house was not within 100 feet of the sewer (which turned on the question, what was the proper mode of measurement?), and that the owner could not therefore have been compelled to make a communication with it; and further, that the owner had not, in fact, been required to do so; nor was it stated as a fact that the existing drain was insufficient; but the decision of the Court on the construction of the lease made it unnecessary to argue these points.

is, supposing the defendant had done that which it was his duty as owner to do under 29 & 30 Vict. c. 90, s. 10, could he have recovered the cost from the plaintiff under the covenant in the lease? If not, then the plaintiff, having done the work under an arrangement by which the expense was to be borne by the party liable, can recover the amount from the defendant. *Tidswell v. Whitworth* (1) is a distinct authority to shew that the defendant could not have recovered, whether he had done the work himself, or paid an assessment made on him by the local board, as having done it on his default. The duty of making the drain was one imposed on the defendant, as in the case cited the duty was imposed on the plaintiff; but it is impossible to say that that duty was a "tax, rate, assessment, or outgoing" imposed "on the premises, or on the tenant or landlord in respect thereof."

*Herschell, Q.C.* (with him *Holl*). The distinction between an outgoing imposed on the defendant and an outgoing rendered necessary by a duty imposed on him, is a distinction without a difference. The case of *Tidswell v. Whitworth* (1) is distinguishable on the ground that the words there only included "taxes, charges, &c., taxed, assessed, or imposed upon or in respect of the premises thereby demised, or any part thereof;" here the words are added "or upon the landlord or tenant in respect thereof;" and the word "outgoings," the most extensive word possible, is also added to the words "taxes, rates, and assessments." It is impossible to deny that the cost of making the drain, if incurred by the defendant under 29 & 30 Vict. c. 90, s. 10, would have been an outgoing imposed on him as landlord, and therefore within the covenant. The case falls within *Sweet v. Seager* (2), and *Thompson v. Lapworth* (3), the latter of which cases was later than *Tidswell v. Whitworth* (1), and was decided in effect upon words similar to those which occur here.

*Prentice, Q.C.*, in reply. In *Thompson v. Lapworth* (4) the case was expressly distinguished from *Tidswell v. Whitworth* (1), on the ground that the charge was not one imposed on the landlord by reason of his default in performing his statutory duty; and in the

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(1) Law Rep. 2 C. P. 326.

(2) 2 C. B. (N.S.) 119.

(4) Law Rep. 3 C. P. 149, at pp.

(3) Law Rep. 3 C. P. 149.

152, 154, 161.



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circumstance, that the charge, or outgoing would have only arisen from the defendant's default, the present case and *Tidswell v. Whitworth* (1) agree.

BRAMWELL, B. I am of opinion that our judgment must be for the defendant. I go a long way with the argument which my Brother Willes described in *Thompson v. Lapworth* (2) as a captivating one, that the landlord would be liable for what may be called capital expenditure, but not for expenditure which should be charged against revenue.

But, in many of these cases, one cannot help seeing that the intention is that the landlord shall be liable for neither; and I can hardly conceive stronger words for effecting that purpose than those which are used here. The plaintiff has covenanted to "bear, pay, and discharge" all "outgoings whatsoever, which at any time or times during the said demise shall be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof." Now how has this obligation arisen? A drain was to be made from the plaintiff's house into the sewer of the local board by the landlord, or, if he failed to do it, by the local board. In fact, it was made by neither, but by the plaintiff; but under the arrangement between the parties, we must consider what was the duty of the defendant in respect of it. It is said that it was the duty of the defendant to make the drain, and that if he had done so, the expense would not have been an outgoing, "taxed, rated, charged, assessed, or imposed" upon or in respect of the premises. Now the point so stated seems to be scarcely arguable; for the argument in substance is, that if the local board had a right to make the drain in the first instance, and charge the expense on the defendant, it would be an outgoing imposed on the landlord in respect of the premises; but if they had a right to compel the defendant to do it, and he did it, it would not be an outgoing imposed on him in respect of the premises. This seems preposterous. It would certainly be something which had gone out, an expense which he had been at in respect of the premises, and it would have been an expense imposed upon him; and the plaintiff would there-

(1) Law Rep. 2 C. P. 326.

(2) Law Rep. 3 C. P. at p. 158.

fore have been bound to indemnify him against it. I cannot see any distinction between this case and *Thompson v. Lapworth* (1), except that there it was not the duty of the landlord but of the local authority to do the work, and the landlord was to pay what was assessed; a distinction which is utterly unsubstantial. That case then is in point; and I think it was properly distinguished from *Tidswell v. Whitworth* (2), which, as I understand it, was, I think, rightly decided. The defendant, therefore, is on this ground entitled to judgment, and we need not consider the other grounds on which the defendant contends that the plaintiff is unable to recover.

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POLLOCK, B. I am of the same opinion. In the absence of authority, I should have thought that a charge paid in consequence of the making of a sewer, whether by or on the requirement of the local authority, was an outgoing charged on the demised premises, or on the landlord or tenant in respect thereof. It is not strictly charged on the premises, but it is charged in respect of them. And it is certain that the general scope and intention of the covenant and the reservation was, that the landlord should get the rent clear of all charges whatsoever. This conclusion is supported by *Sweet v. Seager* (3), and *Thompson v. Lapworth*. (1) The only case which might at first sight seem to raise a doubt is *Tidswell v. Whitworth* (2); but the words there were much more limited, and, without questioning that decision, I think it need not prevent us from coming to a conclusion in favour of the defendant.

*Judgment for the defendant.*

Attorney for plaintiff: *E. W. Crosse*.

Attorneys for defendant: *Underwood & Colman*.

(1) Law Rep. 3 C. P. 149.

(2) Law Rep. 2 C. P. 326.

(3) 2 C. B. (N.S.) 119.

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June 8.

## NEVILL v. BRIDGER.

*Burial Fees—Selection of Site—Opening Vault—Non-parishioners—Contract.*

A vicar of a parish, being freeholder of the church and churchyard, may make a special contract for the payment of a fee, other than the customary burial fee (if any), for the burial of a non-parishioner in a particular vault in the parish church.

*Ex parte Blackmore* (1 B. & Ad. 122) followed.

## APPEAL from the Berkshire County Court.

The plaintiff is the Vicar of Wraysbury, Bucks, and originally sued the defendant, the executor of one Elizabeth Davies, for what were described in his particulars as “fees in connection with the burial of the late Mrs. Davies.” At the hearing it was objected by the defendant that the Court had no jurisdiction, on the ground that the fees were recoverable, if at all, only in the Ecclesiastical Court. Thereupon the plaintiff’s counsel stated that he proposed to rely upon a special contract by the defendant to pay the moneys sued for, and the particulars were by leave amended thus: “for that it was agreed between the plaintiff and the defendant that in consideration that the plaintiff (then being Vicar of Wraysbury) would give his consent, licence, and permission to the defendant to bury the body of Mrs. Elizabeth Davies in the parish church of Wraysbury, and would do and cause to be done in the said church all things necessary and incidental to the said burial in and about the opening of a vault, and otherwise, the defendant promised the plaintiff to pay him a certain sum of money, to wit twenty guineas; and the plaintiff says that he gave his consent, &c., and the body was buried accordingly, and all things were done, &c., yet the defendant has not paid the said sum of twenty guineas.” The defendant objected to this amendment.

It was proved that in 1852 Henry Davies, husband of the deceased, was buried in a brick grave in the aisle of Wraysbury church, belonging to the family of Mrs. Davies. He was not a parishioner, and his friends paid the vicar 21*l.*, such sum being the amount charged in Wraysbury for the burial of non-parishioners. On the 24th of January, 1868, Mrs. Davies died. She was not a parishioner at the time of her death. By her will

she left directions that she was to be buried in Wraysbury church near her husband. The defendant accordingly authorized an undertaker to make the necessary arrangements and do all that was requisite for that purpose. The undertaker communicated with the authorities on the spot, and applied for permission to open the vault, and to bury Mrs. Davies there. On being informed the fees would be high, he stated that he had conducted Mr. Davies' funeral in 1852, and had paid the charges made in respect thereof. The necessary consent was then given, the brick grave was opened, and Mrs. Davies interred therein. The defendant was present at the funeral.

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The parish clerk, who had lived in the parish fifty years, and succeeded his father in office in 1845, produced an old book from the iron chest in the parish church, containing, among other things, in the handwriting of the deceased vicar, a scale of fees. These he stated to have been in force as long as he could remember. According to this scale the charge for opening a vault in the church for the burial of a non-parishioner was twenty guineas.

Soon after the funeral this sum was demanded of the undertaker, and a cheque promised. The defendant, however, upon the matter being brought to his notice, demurred to the charge as excessive, and declined to pay it.

The learned judge found that the sum claimed was a reasonable one and was that customarily charged by and paid to the vicars of Wraysbury for their consent to the burial of non-parishioners within the parish church, and for leave to open the soil for that purpose, and that the defendant had by his authorized agent agreed to pay such reasonable amount as should be required, and gave judgment for the plaintiff for 21*l*. From this judgment the defendant appealed.

The questions were, first, whether the judge had power to amend the particulars; and, secondly, whether the Court had jurisdiction to entertain the plaintiff's demand as set forth in the amended particulars; and, thirdly, whether the verdict could be supported with or without the amendment.

*Bayford*, for the appellant. First, this amendment ought not



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to have been made, as without it there was no cause of action of any kind. [The Court intimated that they thought the amendment a proper one.] Secondly, the plaintiff is not entitled to recover on the original particulars. They treat the claim as one for burial fees. But these can only be recovered in the Ecclesiastical Court: *Spry v. Gallop*. (1) Moreover, they must have existed from time immemorial, for, unless by custom, they are not demandable: *Andrews v. Cawthorne*. (2) Here there was no evidence of any customary payment. The amount is unreasonable considering it as a customary fee: *Bryant v. Foot*. (3) Lastly, he cannot recover on the amended particulars. Such a contract as that alleged is void as against public policy. The vicar is freeholder of the church and churchyard, but he cannot make a profit by charging exorbitant fees for selection of site. It is true he may not be bound to bury a non-parishioner, nor to bury in any particular spot in the church or churchyard, but if he consents to do so he ought not to be permitted to make a charge over and above the ordinary burial fee, if any. The only guide for the exercise of his discretion is the fitness of the person to be buried: Gibson, Codex, 2nd ed. p. 453; *Rich v. Bushnell*. (4)

*H. D. Greene*, contrâ. The plaintiff rests his case on the particulars as amended. The clergyman has the right to select the place where a body is to be buried: *Fryer v. Johnson* (5), and a valid contract may be made with him to pay any sum which he may think fit to charge. *Ex parte Blackmore* (6) is decisive. There a rector declined to bury in a particular vault unless a fee fixed by himself were paid, and the Court refused a mandamus to compel him; and Littledale, J., says (at p. 124): "If a rector is asked to do that which by law he is not bound to do, he may refuse, except upon certain conditions:" see also *Palmer v. Bishop of Exeter* (7); *Maidman v. Malpas* (8); *Andrews v. Cawthorne*. (9) Again, as Mrs. Davies was a non-parishioner, the plaintiff might have declined to permit her to be buried in the church or church-

(1) 16 M. & W. 716; 16 L. J. (Ex.) 218.

(2) Willes, 536.

(3) Law Rep. 2 Q. B. 161; Law Rep.  
3 Q. B. 497.

(4) 4 Hagg. Eccl. 164.

(5) 2 Wils. 28.

(6) 1 B. & Ad. 122.

(7) 1 Str. 576.

(8) 1 Hagg. Consist. 208.

(9) Willes, 538, n.

yard altogether. There is nothing against public policy in a contract for an extra fee in such a case. If it were not levied the churchyard might soon be overcrowded.

*Bayford*, in reply. *Ex parte Blackmore* (1) only decides that no mandamus would be granted, and the point now made was not argued. On public grounds, perhaps, as in the case of danger or inconvenience from overcrowding, a fee might be imposed. But no such suggestion was made in the present case.

BRAMWELL, B. Three questions were raised in this case, which has been very well argued on both sides. The first was, as to whether the county court judge was right in directing the particulars to be amended, and we are of opinion that he was. The particulars in their amended form are no more than an expansion of the original statement of the plaintiff's claim. Secondly, the judge found as a matter of fact that the defendant had agreed to pay a reasonable fee, and that 21*l.* was a reasonable fee. Even if his conclusion were wrong, we should not interfere with it unless it were shewn that there was no evidence to justify it. But we think that he was right upon this point also. Thirdly, the question was raised whether such a bargain as was made here was capable of being enforced, and it was contended that, although the plaintiff is the freeholder of the church and churchyard, and consequently with him rests the power of refusing to allow any interference with the soil, yet that he is to exercise that power solely with regard to the fitness of the person whom it is proposed to bury, and must not make the payment of money a condition of his assent. It was said that this fee was in truth a burial-fee, and not due therefore except by immemorial custom, and that an express contract to pay such a fee was void. Some of the authorities certainly countenance this view, and especially the passage cited by Mr. Bayford from Gibson's *Codex* (2nd ed. p. 453). But the current of authorities is the other way. Thus we have the authority of Sir William Scott in *Maidman v. Malpas* (2), the case of *Palmer v. Bishop of Exeter* (3), the opinion of Abney, J., in *Andrews v. Cawthorne* (4), and that of Littledale, J., in *Ex parte Black-*

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(1) 1 B. &amp; Ad. 122.

(2) 1 Hagg. Consist. 208.

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1874 *more* (1), and the text writers upon the subject treat these cases as  
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v. It may be that upon some occasion these authorities may be  
 BRIDGER. successfully questioned. But, in the present case, there is no  
 appeal from our decision, and we should not, even assuming we  
 disapproved of them—which I am far from saying that we do—  
 be justified in running counter to them. Our judgment will there-  
 fore be for the plaintiff.

PIGOTT, B., concurred.

Attorney for plaintiff: *Charles Thomas Phillips.*

Attorneys for defendant: *Bridger & Collins.*

*June 9.*

THE WESTERN COUNTIES MANURE COMPANY v. THE LAWES  
 CHEMICAL MANURE COMPANY.

*Defamation—Disparaging Statement about Goods—False and malicious  
 Publication.*

The defendants falsely and without lawful occasion, published a statement  
 disparaging the quality of the plaintiffs' goods, and special damage resulted from  
 the publication:—

*Held*, actionable.

*Young v. Macrae* (3 B. & S. 264; 32 L. J. (Q.B.) 6) distinguished.

DECLARATION, that at the time of the committing, &c., the  
 plaintiffs carried on business as manufacturers and sellers of arti-  
 ficial manures, and had upon sale certain artificial manures, and  
 the defendants also carried on business as manufacturers and  
 sellers of artificial manures, and had on sale certain artificial  
 manures; that the defendants well knowing that the plaintiffs were  
 carrying on the aforesaid business and selling the said artificial  
 manures, and contriving and intending to injure the plaintiffs in  
 their business, falsely and maliciously printed and published, and  
 caused to be printed and published of and concerning the plain-  
 tiffs, and of and concerning them as such manufacturers and sellers  
 of artificial manures, the words following:—

“Chemical Laboratory, University of Glasgow, January 29,

(1) 1 B. & Ad. 122.

1873. Dear Sir,—I inclose herewith analyses of your four samples of manure, which differ much in quality. They are all mixtures, and do not consist of bones and acid alone. No. 2 (meaning thereby the defendants' artificial manures) is much the best, and seems to contain some kind of phosphatic guano. No. 4 (meaning thereby the plaintiffs' said artificial manures) appears to contain a considerable quantity of coprolites, and is altogether an article of low quality, and ought to be the cheapest of the four. The other two are fair articles and may be usefully employed. It is not for me to put an exact value upon the samples, as the prices charged for manures in different parts of the country differ to an extraordinary extent. I know places where No. 2 (meaning the defendants' said artificial manures), would be sold at about 8*l.* per ton, others, where 7*l.* would be its price. I may state, however, the relative values thus: Suppose the price charged for No. 2 (meaning the defendants' said artificial manures) to be 8*l.* per ton; then No. 1 should be worth 7*l.*; No. 3, 5*l.* 10*s.*; and No. 4 (meaning the plaintiffs' said artificial manures), 5*l.* Of course these must be taken as approximation only, and may be modified by the nature of the bargain; but they should be in these proportions."

[Then followed an analysis in detail, purporting to shew the proportion of phosphates and ammonia in the plaintiffs' and defendants' artificial manures respectively.]

Meaning thereby, that the said artificial manures so manufactured, sold, and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants. Whereas, in truth and in fact, the said artificial manures so manufactured, sold, and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants. And by reason of the premises [here followed an allegation of special damage.]

Demurrer and joinder.

June 4. *Arthur Charles*, in support of the declaration. The malicious publication of a falsehood depreciating the plaintiff's

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goods and causing him pecuniary damage, is actionable: *Harman v. Delany*. (1) In *Evans v. Harlow* (2), it was held that special damage must be alleged, but it seems to have been assumed there that an action would lie for untrue and disparaging statements about the goods of a tradesman where special damage has been suffered. It must be conceded that these words are not libellous in the ordinary sense; but the case is similar to an action for "slander of title," which, as is pointed out by Tindal, C.J., in *Malachy v. Soper* (3), is not "an action for words spoken or for a libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." *Young v. Macrae* (4), may be relied on by the defendants. But there all that was decided was that an action will not be maintainable against a man who is only alleged to have made untrue statements about the quality of his own goods. Here there is a distinct statement that the plaintiffs' manures are "altogether of a low quality."

*Bowen*, contra. The declaration does not allege that the defendants knew that the statements were false and amounts to no more than a puff by one tradesman of his own goods. *Young v. Macrae* (4) is in point, for the ratio decidendi was that the mere comparison by the defendant of his own goods with the plaintiff's to the plaintiff's disadvantage is not actionable: *Burnett v. Wells*. (5) The cases of "slander of title" are not analogous to the present case, for in them the plaintiff's proprietary rights are affected. There is no authority which goes so far as to justify the proposition now contended for. In all the cases either the words used amount to a personal imputation on the plaintiff personally or as a tradesman, or else they affect his property. Thus *Harman v. Delany* (1), was a slander of the plaintiff personally in the way of his trade.

[POLLOCK, B. This declaration alleges that the statement was made falsely and maliciously, and contriving to injure the plaintiffs.]

(1) 2 Str. 898.

(2) 5 Q. B. 624.

(3) 3 Bing. N. C. at p. 383.

(4) 3 B. & S. 264; 32 L. J. (Q.B.) 6.

(5) 12 Mod. 420.

The mere telling of a falsehood, even though it be told maliciously, does not give a cause of action: *Miller v. David*. (1)

*Cur. adv. vult.*

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June 9. BRAMWELL, B. In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this,—that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says, “meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants.” I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: “Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;” and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which

(1) Law Rep. 9 C. P. 118.

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is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young v. Macrae*. (1) When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favour of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "*ubi jus ibi remedium*." It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now com-

(1) 3 B. & S. 264.

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plained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C.J., in his judgment in *Malachy v. Soper*. (1) This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shewn. (Com. Dig. tit. Action on case for Defamation, G 11.)

The only question, therefore, that seems to arise is, what is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, *Malachy v. Soper* (2), *Evans v. Harlow* (3), and *Young v. Macrae* (4), I would only observe that, in the two first-mentioned cases, there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother Bramwell. Moreover, there the Chief Justice in his judgment (5) supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

*Judgment for the plaintiffs.*

Attorneys for plaintiffs: *Harris, for Kelly, Plymouth.*

Attorneys for defendants: *Bower & Cotton.*

(1) 3 Bing. N. C. at p. 386.

(2) 3 Bing. N. C. 371.

(3) 5 Q. B. 624.

(4) 3 B. & S. 264.

(5) 3 B. & S. at p. 271.



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## [IN THE EXCHEQUER CHAMBER.]

June 20.

## RICHE v. THE ASHBURY RAILWAY CARRIAGE AND IRON COMPANY, LIMITED.

*Company—Corporation—Memorandum of Association—Contracts ultra vires—Ratification—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 9, 10, 12.*

The defendants were incorporated as a limited company under the Companies Act, 1862, the objects of the company, as stated in the memorandum of association, being, "To make, sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land and buildings; to purchase and sell as merchants timber, coal, metal, and other materials, and to buy and sell any such materials on commission as agents." And by art. 4 of their articles of association, "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution."

The defendants' directors in January, 1865, entered into contracts on behalf of the company, by which the company became purchasers of a concession granted by the Belgian government for the construction of a railway in Belgium, and contracted with the plaintiff that, through the medium of a société anonyme which the company were to form in Belgium, he should be employed to construct the line, and that they would pay certain sums of money into the treasury of the société anonyme for the purpose of payments being made to him thereout for the construction of the railway. These contracts were afterwards modified in certain particulars by agreements entered into in October, 1865, by the directors on behalf of the company.

In October, 1865, the plaintiff entered on the construction of the line; the société anonyme was formed, and for some time payments were made by the company into the treasury of the société in pursuance of their contract with the plaintiff.

In October, 1865, the directors, being advised that these contracts were ultra vires, projected a company to take them over.

At a general meeting of the company held in November, 1865, a balance sheet was presented showing advances on account of the Belgian contracts; objections were raised to this item, but an assurance having been given by the chairman that it would not appear again, but would be taken over by the proposed company, a resolution approving and adopting the accounts was passed.

On the 20th December, 1866, an extraordinary general meeting of the company was held, and a committee was appointed to inquire into the company's affairs. The committee reported to an extraordinary meeting, held on the 1st of May, 1867, that the Belgian contracts were ultra vires, that they did not bind the company, and that the directors were liable to replace the moneys expended, but recommended an amicable settlement. A committee was appointed in pursuance of this recommendation, and, at an annual meeting held on the 14th of May, 1867 (the circular convening which mentioned as part of the business of the meeting

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the consideration and adoption of any report to be made by the committee, and when the advances on the Belgian contracts again appeared in the balance sheet), a resolution was passed, adopting a recommendation of the committee to the effect that certain persons (directors of the company) should "purchase" from the company the Belgian contracts, the company undertaking to take any legal proceedings necessary to enforce the contracts, at the expense and on the indemnity of the purchasers, and reserving their right to maintain that the contracts were ultra vires and not binding on the company; and subject to this resolution the balance sheet was approved.

At another annual meeting, held on the 24th of December, 1867, a formal contract carrying out the resolution of the 14th of May (and which was referred to in the circular convening the meeting) was sanctioned, and the seal of the company affixed, and the entry of "advances" in the balance sheet was altered to "advances to be refunded in accordance with a resolution passed at a meeting of shareholders on the 14th of May, 1867."

In May, 1866, the company repudiated the contracts as being ultra vires.

In an action brought by the plaintiff to recover damages against the company for not continuing to make payments in pursuance of the contracts of January and October, 1865:—

*Held* (in the Court of Exchequer), first, that the contracts were ultra vires.

Secondly (by Martin and Channell, BB.; Bramwell, B., dissenting), that they had been ratified by the shareholders.

Error being brought:—

*Held*, that the contracts were ultra vires.

By Blackburn, Brett, and Grove, JJ., first, that the contracts, though beyond the scope of the memorandum of association, were capable of ratification by the individual shareholders, and, secondly, that they had been so ratified.

By Keating, Archibald, and Quain, JJ., first, that the contracts, being beyond the scope of the memorandum of association, were incapable of ratification; secondly, that there was no evidence that they had been in fact ratified by all the shareholders.

SPECIAL CASE, stated by an arbitrator, in an action brought under the following circumstances:—

The plaintiff (with his brother, since deceased) had previously to 1865 entered into a contract with Messrs. Gillon & Baertsoen, of Belgium, for the construction of a line from Antwerp to Tournai, for which the latter held a concession from the Belgian government.

On the 30th of January, 1865, certain contracts were entered into between Mr. James Ashbury, assistant managing director of the defendant company, and assuming to act as their agent, Messrs. Gillon & Baertsoen, the plaintiff's firm, and a société anonyme (which was to be constituted in Belgium), by which the defendants became the purchasers of the concession, which was to be

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carried out through the medium of the société anonyme, the société contracting with the plaintiff's firm for the construction of the line by them, and the defendants undertaking to pay into the treasury of the société certain sums for the purpose of providing the plaintiff's firm with cash to carry out the contract.

On the 14th of October, 1865, certain further contracts were made between the same parties, introducing certain modifications into the contracts of the 30th of January.

The plaintiff proceeded to construct the line, and for a time payments were made in pursuance of this arrangement; but in May, 1866, the defendants repudiated all further performance of the contracts, on the ground that they were ultra vires.

The plaintiff maintained that the contracts were not ultra vires, and also that they had been ratified by the shareholders, and he brought the present action.

The whole of the material facts relating to the history of the negotiations and transactions between the plaintiff and the defendants, the substance of the contracts, and the facts relating to the alleged ratification by the shareholders, are fully stated in the judgment of Archibald, J., at pp. 272-284.

The Court was to have power to draw inferences of fact.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover from the defendants any damages in respect of the above matters.

If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiff for such sum as should be assessed by the arbitrator, subject to the directions which the Court should give as to the principles on which such damages were to be assessed, with costs of suit.

If the Court should be of a contrary opinion, then a judgment of non pros. was to be entered for the defendants with costs of defence.

The case was argued on the 3rd and 5th of June, 1872, by *Benjamin* (with him *Pollock*, Q.C., *Giffard*, Q.C., and *W. G. Harrison*), for the plaintiff; and by *Sir J. B. Karslake*, Q.C. (with him *Watkin Williams* and *Cohen*), for the defendants.

*Cur. adv. vult.*

Nov. 25, 1872. The following judgments were delivered :—

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CHANNELL, B. The question which we have to decide is, whether the incorporated partnership, sued under the name of the Ashbury Railway Carriage and Iron Company, Limited, is bound by a contract entered into in its name with the plaintiff.

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The question is one to be determined, in my opinion, by the application to the case of the appropriate principles of the law of agency.

In some of the earlier cases quoted in the argument, in which questions were discussed relating to contracts ultra vires of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity by their individual consent to contracts not authorized by the memorandum of association, or other like instrument, by which the constitution of the company is defined. The objection to such a contract is not that it is illegal, and therefore unenforceable, but simply that it is unauthorized by the body whom it purports to bind. If, therefore, the shareholders of a company knowingly hold out their directors as authorized to make, on their behalf, particular contracts, the company will be bound by those contracts, notwithstanding that they are not within the powers expressly conferred on the directors for binding the company. Persons dealing with such companies and their directors are, however, in this respect, in a different position from persons dealing with ordinary trading partnerships, that they are taken to know that the directors' powers are likely to be limited, and they are bound to read the deed of settlement or articles of association limiting the directors' authority. They are not, however, bound to do more: see *Royal British Bank v. Turquand* (1), *Totterdell v. Fareham Brick Co.* (2), and other cases; and where an act may be brought within the powers

(1) 6 E. & B. 327; 25 L. J. (Q. B.) 317.

(2) Law Rep. 1 C. P. 674.



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of the directors by the compliance with certain formalities, they are entitled to assume that all such formalities have been complied with, and are not bound to inquire into the fact. There is one other point to be noticed, which I quite agree it is important should not be lost sight of, viz. that the shareholders are entitled to assume (unless they are informed to the contrary) that their directors are managing the company in accordance with their powers.

Now, to apply these principles to the case before us. The first question that arises is, whether the contract sued on was one within the actual authority of the directors, that is to say, whether it related to business authorized by the memorandum of association. Now, as to this, I am forced to come to the conclusion that it did not. The only words within which it can come are "the business of mechanical engineers and general contractors." In this expression I think the word "contractor" must be taken to have its popular sense of a man who contracts for the execution of engineering works or the like; and if I could see, looking at the whole of the contracts entered into by the directors of this company in reference to the Belgian railway, that the main object of the scheme was to contract for the construction of the railway or for the supply of its rolling stock, and that what may be called the financing agreements were subsidiary and incidental to the attainment of this main object, then I might be inclined to think that the whole of the scheme might come within the business of "general contractors." It is clear, however, that the company were to have nothing to do with the construction of any works or the supply of any rolling stock. They were merely to enter into a financial speculation, the present plaintiff (or his then firm) occupying the position which would be popularly described as that of "contractor" to the line. Even if the negotiations which took place ineffectually with reference to the defendants supplying the rolling stock had resulted in an arrangement for their doing so, it would rather seem that this contract would have been incidental to the main scheme of the financial speculation, rather than that the latter would have been incidental to the former. It is, I think, impossible to hold that the expression "general contractor" authorized any such contract whatever. I therefore arrive at the

conclusion that the directors had no actual authority to bind the company by the contract sued on at the time when they entered into it. It follows also, from the principles already referred to, that the plaintiff ought to have known of this want of authority, and that if he did not know, he was, at all events at the time of entering into the contract, in no better position than if he had known in fact.

It is, however, argued that the articles of association contemplate the extension of the company's business by special resolution, and whether or not such a resolution had been passed was a matter into which the plaintiff was not bound to inquire, according to the doctrine of *Royal British Bank v. Turquand*. (1) I am, however, unable to adopt this argument, at all events to the full extent to which it was pressed upon us. The provision in the articles is that an extension of the company's business beyond the objects already specified shall take place only by a special resolution. A special resolution must be registered in the same place as the articles are registered. Therefore to a person searching at the registry, this provision rather amounts to notice that there has *not* been any extension of the company's business, than that there *has* been.

I do not think, then, that the plaintiff, at the time when this contract was entered into with him, and when he was supposed to know what the registered documents relating to the company would tell him as to the limitation of the directors' authority, was entitled to say that, as between himself and the defendants, the contract was binding upon the defendants. It may, however, have become so subsequently, by what afterwards took place; and in considering the effect of the subsequent conduct of the defendant company and shareholders, it is, perhaps, of some importance to remember that the plaintiff must be taken to know that, according to the constitution of the company, means were provided for formally extending the business of the company so as to include the contract with him.

I now come to the question whether the conduct of the shareholders constituting the defendant company has not made the contract binding upon the company. This question turns upon the

(1) 6 E. & B. 327; 25 L. J. (Q. B.) 317.

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amount of knowledge which the shareholders had of the matter. If the shareholders knew that the directors had entered into this contract on behalf of the company, and that the directors and the plaintiff were continuing to act upon the contract as though it were binding upon the company, then it was, in my judgment, necessary for them to repudiate the contract at once if they meant to do so at all, and to communicate this repudiation to the plaintiff. If they did not do so, but knowingly permitted their directors, and the engineer appointed by them, to deal with the plaintiff as their authorized agents, they in effect held out the directors and the engineer as authorized by them, and have thereby made themselves liable. It may well be that a person who learns that a contract has been made on his behalf by an unauthorized agent with a third party is, as my Brother Bramwell says, not under any legal duty to inform the third party of the want of authority. But this can only be so where the unauthorized agent has ceased his unauthorized acting. If he continues to act as agent to the knowledge of the supposed principal, and without any repudiation by him, the principal must be taken, in my opinion, to have accredited and held out the agent as authorized to represent him, and then the acts of the agent done in affirmance or part performance of the contract after such holding out must be taken to be the acts of the principal, so that he thereby becomes bound to the third party on the contract, as if he had himself acted on it. In such a case the party so becoming liable might not lose his right to complain of his agent having exceeded his actual authority. He would merely be bound to the third party by means of his having permitted the agent so to act with ostensible authority.

Now let us see what took place in the present case. It seems that the directors, after entering into the contracts in question, were advised that the company was not bound by them, owing to their being *ultra vires*, but that the 26,000*l.* paid upon the contracts could not be recovered back. In this view of the case, a simple repudiation of the contracts would have involved a loss of 26,000*l.* Doubtless for the purpose of avoiding this loss, a scheme was set on foot for transferring the contracts to a new company to be formed for the purpose. Prospectuses of this proposed company,

with an accompanying circular letter, were circulated by the directors amongst the shareholders of the defendant company. Then a balance sheet was circulated showing advances to have been made on account of these contracts. I quite agree that this balance sheet contains nothing which necessarily disclosed to the shareholders that the advances had been made in respect of ultra vires contracts, and if this balance sheet were the only evidence of knowledge on the part of the shareholders, it would be difficult to say that knowledge could be inferred.

As regards the shareholders who attended the meeting of the 5th of December, 1865, however, it is not all. It seems that at that meeting the Belgian contracts were the subject of strong observations, and that the directors, being under the impression that the new Antwerp, &c., Company would take over the contracts, led the meeting to believe that the item would not appear in the accounts again; that the meeting was satisfied with this explanation, and voted a dividend upon the assumption that the 26,000*l.* was an available asset of its full nominal value. That dividend was afterwards received by all the shareholders. Now remembering that these statements come from documents of the defendant company, and that no explanation has been offered by them as to their contents, it is difficult to avoid drawing the inference that what passed at that meeting was this: that objection was taken to these contracts on the ground of their not being legitimately within the scope of the company's business; that this fact was therefore then communicated to all the shareholders present, even if they did not know it before; that the scheme of forming a new company (of which the shareholders had already been advised by circular) for the very object of taking over these contracts, was also known; and that the shareholders present sanctioned the course proposed by the directors, of endeavouring to get the new company to take the contracts, and in the meanwhile of continuing to act upon them. Now it may well be, as suggested by the counsel who advised the committee of investigation, that the course taken at this meeting would not have the effect of absolving the directors from liability for misappropriating the moneys of the company. I think, however, that so far as the shareholders present at that meeting are concerned, their sanction

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to the directors to transfer the contracts clearly amounts to an adoption of them as between themselves and the plaintiff. Transferring the contracts to others presupposes an election to take them in the first instance themselves, and not to treat them as wholly void or invalid. The shareholders were not entitled to try their chance of getting a favourable price for these contracts, and then, after having failed to do so, to turn round and repudiate them as wholly invalid.

If, therefore, the shareholders present at this meeting were authorized to bind the company by adopting these contracts, I should have no doubt but they had done so. It is, however, clear that they could not do so. The meeting was only authorized to bind the absent shareholders in matters relating to the business of the company, and in its capacity of a general meeting of the company could no more bind the absent shareholders by undertaking new business than the directors could. In order to bind the defendant company it is necessary that every member of the company should, with knowledge of the excess of authority on the part of the directors, have so conducted himself as to entitle the plaintiff to assume that he assented to what was being done.

If, however, any member, knowing what was going on, chose to absent himself from the meeting, and to leave it to the more active members to decide what was the best course to take, he is, in my judgment, as much bound by their action or inaction as if he had attended the meeting himself. Neither is it, in my judgment, incumbent on the plaintiff to shew by particular evidence knowledge on the part of every individual shareholder. If he shews general knowledge amongst the shareholders, he makes a *prima facie* case, and throws upon the defendants the burden of shewing that there were any shareholders who did not know. In the *Phosphate of Lime Co. v. Green* (1), all the judges noticed the fact that no shareholder was called to say that he did not know. I agree with their remarks as to the importance of that, and think they are applicable to the present case. Here no explanation whatever is given on the part of the defendants. We are told there are few shareholders in the company, and we are not even

(1) Law Rep. 7 C. P. 43.

told that there were any shareholders in the company on the 5th of December, 1865, who did not attend the meeting. If it were necessary I should, of course, draw the inference that there were other shareholders; but, the matter being left entirely to inference, I arrive at the conclusion, in the absence of any evidence to the contrary on the part of the defendants, that the shareholders generally were informed of all that the meeting was informed of. The statement as to the prospectus and circular letter relating to the Antwerp company seems to me important. It is true that the gentlemen advising the company did not think that these communications so fully disclosed the state of affairs, especially as regards the personal liability of the directors, as to make the conduct of the meeting amount to an absolution of the conduct of the directors. Neither do I think it did. The view I take of all the facts is this: that the shareholders generally were aware that contracts had been entered into not within the scope of the company's business, and that the directors proposed to get out of the difficulty, not by at once repudiating the contracts and informing the parties to them that they were void, but by continuing to act upon them as valid until they could transfer them to another company, which they proposed to do as soon as possible; that the shareholders were content to look to the directors for their indemnification in case of loss, leaving them to take what they considered the best course of getting out of the difficulty.

By this course of conduct the shareholders, in my opinion, permitted the directors to hold themselves out to the plaintiff as authorized to bind the company, and thereby they conferred upon the directors what is sometimes called an implied authority, but more accurately an ostensible authority, to bind the company. The directors did undoubtedly so act upon the contracts as to affirm them and make them binding if their acts could do so; and thereby, as it seems to me, the company became bound.

It may be said that the principle of ostensible authority cannot apply, because the plaintiff must be taken to know the limitation of the directors' actual authority. That reasoning, however, is not, I think, sound; because, when the proposition is once established, as it clearly is by the cases, that an ultra vires contract may be adopted and made binding on a company in its corporate capacity

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by the individual assent of all the members, it follows that the plaintiff must be taken to know that the limit of the directors' authority may be removed by such assent, and a more extended authority be conferred upon them. In cases, therefore, where the individual members of a company assent to the directors assuming a larger authority than that conferred upon them by the original constitution of the company, a person dealing with the directors is entitled to say that the company is bound by acts done within the larger authority. I am, therefore, of opinion that our judgment should be for the plaintiff.

BRAMWELL, B. I am very clearly of opinion that the contracts of the 30th of January, 1865, and of the 14th of October, 1865, were ultra vires of the defendant company's directors. The substance of these contracts was this: Gillon and Baertsoen had obtained the right to make a railway in Belgium. This right the defendants' directors supposed to be valuable to its owners, that is to say, the line could be constructed for a certain sum, and a société anonyme could be constituted, with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the defendant company, and, to do so, purchased the concession. This was their main object. But the plaintiff held a contract with the concessionaires to construct the line; and to accomplish the directors' object it was necessary or desirable, or they thought it was, that they should agree with the plaintiff that the defendants should constitute a société anonyme; and, as the plaintiff went on with the work, the defendants should pay into the hands of the société proportionate funds. The further contract entered into in the defendants' name, called D., is of no importance to this case. The directors accordingly entered into two contracts in the defendants' name; one with the concessionaires to purchase the concession, the other with the plaintiff to furnish the société anonyme with funds; the latter contract being auxiliary to the former. They paid the concessionaires 26,000*l.*, part of the price. Now whatever may be the meaning of "carrying on the business of mechanical engineers and general contractors," to my mind it clearly does not include the making of either of these contracts.

It could only be held to do so by holding that the words "general contractors" authorized generally the making of any contract, and this they certainly do not.

Then it was said that by clause 4 of the articles of association an extension of the defendants' business may take place in pursuance of a special resolution; that, therefore, the directors had a conditional power to enter into any contract; and that the plaintiff was not bound to inquire into the internal proceedings of the company, and that, if necessary, it was to be assumed, or presumed, that such special resolution had been passed. Aply as this was put, I am of opinion it is untenable. The special resolution is not an internal proceeding. It must be registered equally with the memorandum of association. It, in effect, becomes part of it, and must as much be noticed by persons dealing with the company. If none is registered, that is notice to every one that none exists, if indeed there is none. There is no more a presumption to be made that it exists than it is to be presumed that articles of association exist different to those registered. So far I am glad to think I agree with my Brother Channell.

I think, therefore, the question is reduced to this, was the contract with the plaintiff ratified? If it was, it was between the 5th of December, 1865, and May, 1866. On this the facts are as follows:—In November, 1865, a balance sheet was sent to the shareholders. That shewed to all who received it that there had been advances on contracts, Madrid, Placentia, and Malpartida Railway, 41,338*l.* 11*s.* 10*d.*: Anvers, Douai, and Tournai Railway, 27,191*l.* 14*s.* 8*d.*; those sums were treated as assets of the company. The 27,191*l.* 14*s.* 8*d.* was the 26,000*l.* paid to the concessionaires and interest. In truth, that sum was not an asset; it never was to come back to the defendants. The true asset was the concession purchased; its value should have appeared on that side, and the obligations on account of it on the other. I am imputing no fraud; it might be a convenient way of stating the account. But it certainly did not disclose the truth, and though it might put a cautious shareholder on inquiry, it certainly did not shew an ultra vires contract; for there might have been a contract intra vires on which advances to that amount might have been made. But at the meeting, we must take it, the truth appeared.

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Possibly only so much as was necessary to explain those items, viz. that the concessionaires had been paid 26,000*l.*, whatever may be the explanation of the other item. But I think, and as a juryman find in favour of the plaintiff, that the meeting was told not only of that, but of the contract with the plaintiff. Then what did the meeting? They objected to what had been done. They objected to the contract of purchase. They objected to their money having been so laid out, and we must take it they objected to further outlay, viz. to further payments to the concessionaires, and, if they knew of it, to further, indeed to any, payments to the société anonyme, for I believe none had been made under the contract with the plaintiff.

But the directors seemed to think that the Antwerp, &c. Contract Company would take over the Belgian contract; and the chairman gave the meeting to expect that it would not again appear in the account, that is to say, that instead of that item appearing as an asset, or instead of its appearing that the company were owners of the concession as an asset, and liable on the purchase of it for its price per contra, the transaction would disappear from the accounts, and either the accounts would shew 27,191*l.* 14*s.* 8*d.* more cash, or some other asset purchased therewith. And so the meeting did nothing, but approved and adopted the accounts. Now this approving and adopting the accounts is only a recognition that they are accurately stated, and on correct principles; for example, that the figures are right, and that it is right to take the debts owing at a certain amount, making no, or no greater, deduction than made, if any, for bad debts. But it is no approval of the transactions shewn in the accounts.

Now when the facts were disclosed at the meeting, the shareholders had a right to object to the contract purchasing the concession, and to the defendants being bound by it, to require that no further outlay should take place on it, and that the directors should at once replace the 27,191*l.* 14*s.* 8*d.* The shareholders did not insist that the directors should replace the 27,191*l.* 14*s.* 8*d.* at once, they let that stand over, reserving their claim on the directors. This is manifest, for afterwards, when called on, the directors admitted their liability, and never pretended that their accounts had been approved or ratified at that meeting. But though the

shareholders did not insist on the immediate replacement of the 27,191*l.* 14*s.* 8*d.*, it is obvious, as I have said, that they did object to the contract purchasing the concession, and to the defendants being bound by it, and did object to further outlay on it. For if they did not do so, if they in any way ratified the contract, how could they afterwards call on the directors to replace the 27,191*l.* 14*s.* 8*d.*? Yet what took place on this occasion, which was a refusal to recognise the purchase of the concession, is nevertheless said to be a ratification of it, and of the contract with the plaintiff now sued on. For there is no other ratification. The stipulated moneys indeed, until May, were paid into the société anonyme, but by the directors, not by the company. This is in effect stated, and appears in this way, that no such payments appear in the defendants' accounts. Then McCandlish, the engineer, continued to act; but he was appointed by the directors, and should have been removed by them. So, also, the secretary wrote, declining, on behalf of the company, to purchase the Douai concession if obtained. No doubt speaking as though the bargain was binding; but he also was acting by order of the directors and not of the company. In short, what was done after the meeting of the 5th of December was done by the directors, not by, nor by the authority of, the defendants, the company, or the shareholders, and if done in the company's name was as much ultra vires as the original contract.

It occurred to me that there might be a duty in the shareholders to warn the parties to the contracts which they repudiated that they did so repudiate, and that their not doing so was a standing by which estopped them. But that is not so. It might be safe, prudent, and benevolent to do so, but it cannot be a legal duty. If A. and B. are partners as hatters, and A. buys wine as for the firm, deliverable at a future time, and pays partly on account out of the partnership funds, B., on discovering it, is entitled to require the money to be replaced, and that no further partnership funds shall be applied in that way; and he would do well to inform the seller of the wine. But he is not bound to do so any more than though he had never heard of A. before A. pledged their joint names. A. is bound at once to tell the seller of B.'s repudiation of the contract, and if he does not, commits a further

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fraud on him, as did the directors here if they continued to represent to the plaintiff that they had authority to make these contracts. I cannot see in these facts any holding out or permitting the belief in the existence of a state of things, precluding them from denying they are parties to this contract. The utmost they authorized was a transfer to a purchaser of the concession. No payment to the plaintiff was authorized by or in the name of the company.

But it is argued in the clear and forcible judgment of my Brother Channell, that the shareholders, by permitting the directors to act as they would have to act in transferring the concession to the Antwerp Company, allowed the directors to hold out the defendant company as owners of the concession. But supposing that to be so, a person is only bound by a holding out where the person to whom that holding out has been made has acted on the supposed state of things so held out. But in this case nothing would be held out till the transfer of the concession took place, and at that moment the defendants would hold out, perhaps that they had been, but at that moment ceased to be, owners of the concession. But then on this the plaintiff never could and never did act. Suppose that the shareholders had passed a resolution that when the directors found a purchaser for the concession, the defendant company would execute a conveyance of it, how would that be any holding out, or the authorizing of any holding out, to the plaintiff or any one else of anything contrary to the true state of facts? Yet what took place at the meeting of shareholders is not more than this, nor so much. Further, there is no evidence of the plaintiff acting upon any such supposed holding out.

But, suppose there was a ratification of the contract for the purchase of the concession, either actually, or by holding out, or authorizing the holding out, that the company were its owners, and suppose the contract with the plaintiff was known to the shareholders at the meeting of the 5th of December, what is there to shew a ratification of the contract with the plaintiff to finance or pay money to the société anonyme? Absolutely nothing. It does not follow as a consequence of ratifying the contract with the concessionaires. The benefit of the purchase might have been obtained, though the contract with the plaintiff was repudiated.

For if the public had taken to the shares and paid up the appointed capital, the société anonyme could have paid the plaintiff, and the line would have been made, and so the profit of the purchase of the concession obtained. On these considerations there seems to me no ratification by the shareholders at that meeting followed by the subsequent matters.

But, assuming that the shareholders there as far as in them lay ratified the contract, how are the other shareholders bound? To bind the company all the shareholders must be bound; all must ratify. If A. and B. are partners, B.'s ratification is necessary to a contract ultra vires of A.; and would be if the partnership consisted of A. and B. and fifty others, and the other fifty ratified, but B. refused. See per Lord Cranworth in *Spackman v. Evans*. (1) What evidence is there here that the shareholders not present at the meeting ratified the contract with the plaintiff? To my mind none. I quite agree with the authorities cited. I should be bound by them if I did not; but I do. Compare, however, this case with the words of my late Brother Willes, in *Phosphate of Lime Company v. Green*. (2) That was indeed a case in which the only question was, was there evidence to support a verdict? But he laid down a rule by which I am content to be governed. He said, "The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition; in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances." I agree. Can it be said here that the shareholders have ratified the contracts, including that with the plaintiff, with full knowledge of the character of the act to be adopted? Assume the shareholders at the meeting of the 5th of December knew of the contract with the plaintiff. Assume they ratified it. How is the full or any knowledge of the absent shareholders shewn? It is clear there were other shareholders than those present. How does any ratification by them appear? Assuming the balance sheets were calculated to put them upon inquiry, which would have led to knowledge, how does it appear there were such

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(1) Law Rep. 3 H. L. C. at p. 191.

(2) Law Rep. 7 C. P. 43, at p. 56.



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inquiries? If I am to find this a fact I refuse to do so, as I do not believe it. No one really believes it. If there was not a ratification and adoption with such full knowledge of the act to be adopted, where is the evidence of the adoption, "with intention to adopt it at all events and under whatever circumstances," either by the shareholders at large, or even by those at the meeting? To my mind there is neither evidence of any such adoption, or of any such intention. As to the facts of that case Mr. Justice Willes' review of the facts from the above sentence to the end of the paragraph at p. 59 should be read. It seems that the transaction objected to was nearly four years old when objected to, and that for three years the shareholders had been receiving dividends on the footing of it. He says, and I agree, it would be a waste of time to refer to authorities to shew that one who chooses to adopt the benefit of a transaction ought to be bound by it. I rely also on the other judgments in that case. Keating and Brett, JJ., both refer to dividends having been received on the footing of the transaction. So, also, I rely on the opinion of Lord Cairns, so felicitously expressed in *Evans v. Smallcombe*. (1) He says, "My Lords, in my opinion lapse of time alone certainly would not make valid that which at the beginning was invalid; and if in this case the defence of Mr. Smallcombe were to rest merely upon the lapse of time, I apprehend that defence would fail. But your Lordships have to consider not merely the question of lapse of time; you have to consider what was the knowledge possessed by the company at large, that is to say, by the shareholders in the company at large, of the Chippenham arrangement, and what was the knowledge possessed by the company of what was being done under the Chippenham arrangement." And afterwards, at p. 256, "My Lords, I only desire to add one word with regard to a phrase which I think, in matters of this kind, is sometimes somewhat misapplied, namely, the phrase 'acquiescence.' If by 'acquiescence' is meant a course of conduct which amounts to active and intelligent consent, I think it very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. But what I think is the real question to be looked at in any case of this kind is this: had the

(1) Law Rep. 3 H. L. C. at p. 253.

shareholders notice of the way in which the affairs of the company were being conducted, and its property was being managed, and of the rights and interests which were being created with regard to the stock of the company? If they had that notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given, although it might well be that any remedy to which they would originally have been entitled against the executive of the company for any breach of duty on their part might be unaffected even by lapse of time." Had the shareholders in this company notice of the way in which its affairs were being conducted? Were they content not to oppose those acts which they knew were every day being done? So Lord Cranworth, at p. 258: "I think it was obvious from the balance sheets, and so that the absent shareholders must have known, that the directors had gone on acting on the assumption that they were at liberty to allow shareholders to retire on the terms indicated in the circular of the 2nd of November, 1848, even after the time originally contemplated had been suffered to pass."

As I said before, if, to decide for the plaintiff, I am to find a ratification, either of the contract for the concession or of that with the plaintiff, and either by the shareholders at the meeting or by the whole body, I cannot so decide. I do not believe, I am satisfied no such thing was intended, and I see no reason for holding, there has been any negligence, standing by, acquiescence and quiescence in the shareholders to bind them. As to the argument that the non-attending shareholders make those who attend their agents to consent and ratify, I cannot agree with it. I can see no duty in the absent shareholders to attend; no fault to find with their absence. There is some ground for such a contention where the ultra vires objection appears on the accounts and reports, but none, as it seems to me, where it does not so appear.

I cannot help saying that though this particular defence may be unbecoming, if the directors are the real defendants, it is one of a character which should be entertained without prejudice. If A. and B. are partners, and A. enters into a contract in their name

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without authority to bind B., I cannot see why B. may not in all honour and honesty object to be bound, though his objection may enure for the benefit of A. One or two innocent persons have been injured by A.; why should the partner bear the loss? Suppose they were not partners at all, the case is the same in principle. And so is the case of a joint stock company, where the shareholders and the legislature do their best to restrict the powers of the directors, yet where it is always urged that it is dishonest of them not to acquiesce in any excess of authority. I concur in the opinion of Lord Cranworth in *Houldsworth v. Evans* (1), who says, "That it is a most essential proposition, to be rigidly enforced, that in these joint stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, unless in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do." And as to this particular case, it is quite possible that the directors did not know their want of authority, and that the plaintiff, though a foreigner, knew as much or as little about it as the directors did, and that the latter are only seeking to avoid bearing the whole loss of a common mistake. In my opinion the defendants are entitled to judgment.

MARTIN, B. The plaintiff is the surviving partner of a firm of railway contractors at Brussels. The defendants are the Ashbury Railway Carriage and Iron Company (Limited), incorporated under the Companies Act, 1872. The action is to recover damages for breach of a contract, dated the 30th of January, 1865, supplemented by another contract, dated the 14th of October, 1865, and the only question to be decided by us is, whether the company are liable to be sued upon these contracts.

The circumstances are these: In March, 1864, the Belgian government had granted to Messrs. Gillon, of Brussels, a concession for making a railway from Antwerp to Tournai, which was expected to be continued to Douai, in France. 4000*l.* was deposited in part-deposit of caution-money, and 16,000*l.* more was to be deposited upon the concession being made absolute, which

(1) Law Rep. 3 H. L. C. at p. 276.

was done on the 3rd of February, 1865. In January, 1865, Mr. James Ashbury, the assistant managing director of the defendants, was sent by the directors to Brussels to carry out a negotiation, as the agent of the defendants, with respect to the concession, and was provided by the directors with 26,000*l.* for the purpose. The result was that he purchased the concession from Messrs. Gillon for 26,000*l.*, and entered into the contract first above mentioned with the plaintiff's firm, who had previously made a contract with Messrs. Gillon, as sub-contractors, to make the railway. In order to carry out the transaction four contracts were entered into by Mr. James Ashbury, all dated the 30th of January, 1865, but it does not seem to me necessary to encumber the judgment with entering into their minute details, as they appear to have been in part made in order to comply with the law of Belgium; and it is sufficient to state that the defendants were declared to be purchasers and assignees of the concession, and, by the contract of the 30th of January with the plaintiff's firm (who undertook to make the line), the defendants contracted to provide them with the necessary cash for the carrying out of the undertaking.

In July, August, and September, 1865, the plaintiff's firm made the necessary plans and surveys for constructing the line, and on the 14th of October, 1865, Mr. McCandlish was accredited by the directors to the plaintiff's firm as the engineer with whom they were to arrange all details, and by whom the plans were to be approved. In October, 1865, the directors sent over Sir Cusack Roney, and Mr. Tahourdin, their solicitor, to Brussels to make final arrangements in relation to the contracts, and Sir Cusack Roney, being duly authorized by the directors to act as the agent of the defendants, upon the 14th of October entered into three supplemental contracts. It also seems to me not necessary to refer more particularly to these contracts, and that it is sufficient to state that by agreement with the plaintiff's firm the defendants were to pay into a company called the *société anonyme* (which company by the law of Belgium was necessary to carry out the transaction) 15,000,000 francs in such manner that the plaintiff's firm should always receive from the *société anonyme* an amount of 15,316 francs in cash upon a certificate of the engineer that 32,760 francs were earned, and so on in the same ratio. The plaintiff's firm proceeded

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to construct the line, and entered into several contracts with other persons for the purpose. They sent to the société anonyme pay-sheets approved and countersigned by Mr. McCandlish, and the proper proportion of each pay-sheet was paid in cash to the société anonyme by the directors in the names of the defendants, in accordance with the provisions of the contracts, and was by them paid to the plaintiff's firm. This continued until May, 1866, when the directors gave notice to the plaintiff that they repudiated all further performance of the contracts on the ground that they were "ultra vires." In consequence this action was brought.

By the memorandum and articles of association the company was established "to make and sell, or lease on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell as merchants timber, coal, metals, and other material, and to buy and sell any such material on commission or as agents." And by article 4 of the articles of association "an extension of the company's business beyond or for any other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." It was argued on behalf of the defendants that the purchase of the concession of the Antwerp, Tournai, and Douai Railway was not an object within the scope of the memorandum of association, and that there was no special resolution authorizing it, and that, if this were so, the contract with the plaintiff's firm did not bind the defendants. The contrary was contended for on behalf of the plaintiff; but with the view I take of the case it is not necessary to give an opinion upon this point; for, assuming the contracts not to have been binding upon the defendants ab initio, I think they have ratified and are bound by them.

The authorities hereafter mentioned, both at law and in equity, establish that the shareholders in a joint stock company may ratify a contract made by the directors, although such contract was ultra vires, or beyond the authority of the directors to make; and in my opinion, if the evidence shews that in December, 1865, the company, by which I mean the body of shareholders other than

the directors, had notice of these contracts, and that the plaintiff's firm were actually engaged in making the railway, and expending their labour and capital upon it, sending in certificates from week to week, and receiving payment of half the amount of their certified debt; and the company for nearly five months, i.e., from December to May (during all which time the work was going on), forbore from giving notice to the plaintiff's firm that they would not take to the contracts, but stood by with the knowledge that the plaintiff's firm were acting under the belief that they were the contracting parties, in my opinion the company are bound and are liable to be sued upon the contracts.

The law upon the subject is clear and well established, both in courts of law and equity. There is no older rule of law than that if a contract be made on behalf of a man who has given no authority to make it, but who afterwards adopts and ratifies it, he is bound by it. The rule is a maxim to be found in Co. Litt. "Omnis ratihabitio retrotrahitur, et mandato equiparatur." Co. Litt. 207 a. This rule has been applied to joint stock companies. It was agreed to be the law in *Spackman v. Evans* (1), and although the majority of their Lordships were then of opinion that a ratification was not proved in point of fact, all concurred as to the law. Lord St. Leonards and Lord Romilly differed from the majority, and Lord St. Leonards said that in his opinion it was enough to shew that the shareholders had the means of knowledge, and that if means of knowledge existed, notice ought to be imputed. Lord Cairns said that the question was, had the shareholders notice of the way in which the affairs of the company were being conducted and its property managed, and of the rights and interests which were being created with regard to the stock of the company? if they had that notice, and did not oppose these acts, they were bound. There are other cases in equity to the same effect. In the case of *Phosphate of Lime Co. v. Green* (2) the same principle was upheld. Mr. Justice Willes fully adopted it. Mr. Justice Brett, in reference to the objection that all the shareholders were not proved to be parties to the alleged ratification, said (at p. 63): "It is impossible to prove that every shareholder had notice, or such a knowledge of the facts as amounts to notice. It is

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(1) Law Rep. 3 H. L. C. 171.

(2) Law Rep. 7 C. P. 43.

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sufficient to shew that facts were made known to the shareholders, the effect of which they might or ought to have inquired into, and to which they ought to have objected at the time, unless they intended to adopt the transaction."

This is in my opinion a sound exposition of the law, and the question is, whether on the 5th of December, 1865, the shareholders of the company (other than the directors) had not notice of the contracts with the plaintiff's firm, and whether the shareholders not present, but who might and perhaps ought to have been present, must not have imputed to them such notice, and whether, by abstaining from giving any notice to the plaintiff or his firm that they objected to the contracts for so long a period as five months, they having knowledge, or means of knowledge, that the plaintiff or his firm were during this period actually performing their part of the contract by making the line under the superintendence of Mr. McCandlish, they are not estopped from denying their liability.

The question is one much more of fact for a jury than of law; and what we have to decide is, what would be the right verdict upon a right direction? The material facts are these:—The contract of the 30th of January, 1865, is made "between the limited liability company, the Ashbury Railway Carriage and Iron Company, of Manchester, represented by Mr. James Ashbury, their assistant managing director, of the one part, and Messrs. Riche Brothers, contractors of public works, residing at Brussels, of the other part."

The contract of the 14th of October is made "between the Ashbury Railway Carriage and Iron Company (Limited), having their seat at Manchester, represented here (Brussels) by Sir C. P. Roney, on the first hand, and Messrs. Riche Brothers, contractors of public works, resident at Brussels, on the other hand." The contracts are therefore in express words made by the company, the defendants.

The next fact is, then, the annual general meeting of the company was held on the 5th of December, 1865, and on the 27th of November a notice of it was sent to all the shareholders, in which was contained the following clause: "The meeting will also be required to declare a dividend payable out of the balance as shewn

in the balance-sheet sent herewith." The balance-sheet on the credit side, headed "Property and Assets," contains the following, amongst other items: "Advances on contracts, Madrid, Placentia, and Malpartida Railway, 41,338*l.* 11*s.* 10*d.*; Anvers, Douai, and Tournai Railway, 27,191*l.* 14*s.* 8*d.*" The sum of 27,191*l.* 14*s.* 8*d.* is the 26,000*l.* with which Mr. James Ashbury was furnished to buy, and with which he bought, the concession from Messrs. Gillon, and interest upon it. At this general meeting, a report of the directors was read, recommending a dividend equal to near 14*l.* per cent. per annum, and the secretary read the balance-sheet, which is stated to be and is certified by David Chadwick, the auditor. Whereupon it was moved, and seconded, and resolved unanimously, "that the report and accounts now read be approved and adopted."

Now, assuming that this was the only evidence in the case, what would it prove? It would prove that the body of shareholders were made acquainted, on the 27th of November, with the fact that a sum of money had been advanced on a contract in respect of the Anvers, Tournai, and Douai Railway, amounting to many thousand pounds; and that on the 5th of December, at a general meeting, they had approved and adopted the account which contained and included it, they having had notice of it for upwards of a week before, and voted a dividend of 14*l.* per cent. to themselves upon the footing of the general account. Now, if they approved and adopted the payment of 26,000*l.* to Messrs. Gillon, being the purchase-money of the concession, they of necessity must have approved of and adopted the purchase; and if they did so, they must, as it seems to me, also have approved and adopted the contract with the plaintiff's firm, which was part and parcel of the same transaction.

It is not necessary to allude to what further inferences might be reasonably drawn from the resolution of the general meeting of the 5th of December, 1865, as much light is thrown upon the matter by what occurred consequent upon two extraordinary meetings of the company, one held upon the 20th of December, 1866, and another upon the 1st of May, 1867. At the meeting of the 20th of December, 1866, a committee was appointed to inquire into the proceedings of the company, and to report; and at the meet-

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ing of the 1st of May, 1867, the committee made their report. From this it appears that, so early as February, 1865, Mr. James Ashbury made a written report to the directors of the Belgian contracts, and "that the original contract with the plaintiff's firm was ordered to be registered and preserved at the office of the company." It also appears from the report that the Belgian contract was made the subject of strong observations at the meeting of December, 1865, and that, in consequence of what the chairman said, the meeting was given reason to expect the item of 27,191*l.* 14*s.* 8*d.* (the Antwerp and Tournai item) would not appear in the account again. From this evidence I draw the conclusion, first, that the shareholders knew of the purchase of the concession from Messrs. Gillon; secondly, that they knew of the contract with the plaintiff's firm which was registered at the office; and, thirdly, that they knew of Mr. McCandlish having been sent over to Belgium, and that the plaintiff's firm were actually engaged and occupied in the making of the line; and I am as satisfied as I can be of anything, that a jury would come to the same conclusion from the same evidence. Suppose the plaintiff to have brought an action for work and labour done during the period between the 5th of December, 1865, and May, 1866, during which time the defendants knew that the plaintiff was under the belief that he was doing the work upon their credit, but during which time they abstained from communicating to him that they dissented from the contract, in my opinion the case would be what is called an undefended cause. In more than one of the cases before cited, much stress was laid upon the circumstance that no shareholder was called to prove that he did not know of the disputed contract. In the present case there are not very many shareholders, and not one was called to prove that he did not know all that occurred at the general meeting on the 5th of December, 1865. I have only to add that if I were on a jury, upon the evidence in this case, I would find a verdict for the plaintiff, upon the ground that it was the duty of a shareholder who, on the 5th of December, 1865, desired to dissent from and put an end to the contract with the plaintiff, to communicate such dissent to him, and stop the expenditure of his labour and capital upon the making of the line.

The directors and the other shareholders continued for some time to dispute with each other over the Belgian and Spanish contracts, and the result was, that by a deed of the 24th of December, 1867, the matter was arranged, the directors becoming the purchasers of the interest of the company in the two lines, the Spanish and the Belgian, and agreeing to pay 27,705*l.* 0*s.* 3*d.* for the estate and interest which the defendants had in them. There is a covenant in this deed that the directors shall indemnify the defendants against the obligations of every description which had been entered into by the Ashbury Company, or any of its directors or agents, in respect of these contracts, so that in the event of the defendants being compelled to pay damages, they will be entitled to be recouped by the directors.

That the directors would be liable upon the contracts sued on there can be no doubt; and it does seem extraordinary, they being solvent and affluent men, that they should not have taken upon themselves the defence to this action upon its merits, if there be any, and prevented the appearance at least of what seems to me an unjust repudiation.

*Judgment for the plaintiff.*

The defendants brought error.

June 21, 22, 23, 25. *Watkin Williams, Q.C.* (with him *Sir J.B. Karslake, Q.C.*, and *Cohen, Q.C.*), for the defendants. First, the contracts were ultra vires, being beyond the scope of the memorandum of association, and therefore did not originally bind the company.

[THE COURT intimated that he might for the present assume them to be so.]

Secondly, if they were ultra vires as being beyond the scope of the memorandum, they were incapable of ratification. By s. 8 of the Companies Act, 1862, the memorandum of association of a company limited by shares is to contain "(3.) the objects for which the proposed company is to be established;" and by s. 12, "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned (s. 50), as to increase

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its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is herein-after provided in the case of a change of name (s. 13) no alteration shall be made by any company in the conditions contained in its memorandum of association." (1) The effect of the 8th and 12th sections is, that all acts beyond the scope of the memorandum are impliedly prohibited; and although all the shareholders of the company were to consent to such a contract, and the seal of the company were affixed, the company would not be bound; for the seal only binds the company when it is duly and legally affixed: *D'Arcy v. Tamar, &c., Ry. Co.* (2); Lindley on Partnership, vol. 1, pp. 251, 262 (1873). But the power of a company to ratify a contract can be no greater than their power to make it. Ratification is nothing but the making of a contract where none existed before, although, when made, its effects are retrospective; and the prohibition to do the one includes the prohibition to do the other also. And the reason of the prohibition applies equally to both. The memorandum is that which intending shareholders and the public which deals with the company rely on as describing the nature of the company and the scope of their business; and they are equally deceived, whether the ultra vires contract was originally made or was afterwards adopted by the individual shareholders. But no such argument applies to acts which are within the memorandum, and are only ultra vires because the company have not complied with the provisions of their articles of association. Those acts they had power to do; their invalidity was only due to the want of a preliminary required by the internal regulations of the company, and which the company might have performed; and when such an act is validated by acquiescence, all that happens is that the shareholders agree to dispense with rules which they have established for the conduct of their own business. On the

(1) 30 & 31 Vict. c. 131 (passed after the date of the transactions in question) allows of other changes being made, as, to render the liability of di-

rectors or managers unlimited (s. 8), to reduce the capital of the company (ss. 9-20), and to subdivide its shares (ss. 21, 22).

(2) Law Rep. 2 Ex. 158.

contrary, the invalidity of an act which is beyond the scope of the memorandum does not depend on the want of any such preliminary; for there is no process by which the company could have rendered themselves competent to do it. Again, with reference to acts invalid only for want of compliance with the internal regulations of the company, no one is deceived by their being ratified; on the contrary, it was in the power of the company to take the proper course, and those who deal with them are entitled to assume that it will be or has been taken; the deception consists in not taking it, and the ratification only cures the effect of the deception.

It is with respect to acts of the latter kind only that the cases have decided that they can be rendered effectual by the assent of all the shareholders. [In addition to the cases cited in the judgment, he referred to *Imperial Bank of China v. Bank of Hindustan* (1); *Re Phoenix Life Assurance Co.* (2); *Macgregor v. Dover and Deal Ry. Co.* (3); *Attorney General v. Compton.* (4)]

Thirdly, assuming the defendants had power to ratify the contract, they have not done so in fact. It can only be done by the assent of all the shareholders, and there are no facts from which such assent can be inferred. Neither if the assent of all to what was done at the meeting of the company were proved is there any ratification, because they have throughout repudiated this liability, and by the deed of the 24th of December, 1867, they only undertook to give the so-called purchasers such advantages as they could give without accepting the liability of the contracts, which they at the same time expressly disclaimed.

Fourthly, the alleged ratification was never communicated to the plaintiff, and cannot undo the previous repudiation.

*Benjamin, Q.C.* (with him *W. G. Harrison*), for the plaintiff. First, the contracts were within the scope of the words in the memorandum, "to carry on the business of mechanical engineers and general contractors."

[THE COURT intimated that the words "general contractors"

(1) Law Rep. 6 Eq. 91.

(2) 2 J. & H. 229; 31 L. J. (Ch.) 69.

749.

(3) 18 Q. B. 618; 22 L. J. (Q.B.)

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(4) 1 Y. & C. Ch. C. 417.



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must be read with the context, and could not include every sort of business usually undertaken by contractors.]

Secondly, the contracts nevertheless bound the company. It is not disputed that if, as in *Chambers v. Manchester and Milford Ry. Co.* (1), there were express words of prohibition, the contracts could not be enforced against the company. But it is admitted on the part of the defendants that there is no express prohibition, and no such prohibition can be implied from the 8th and 12th sections of the Companies Act, 1862. When those sections are read in conjunction with the 11th and 14th, it is plain they are not to be taken as making all acts beyond the scope of the memorandum absolutely illegal and void. The object of the memorandum, as well as of the articles of association (which is only required in the case of a company whose capital is limited by shares—s. 14), is the protection of the shareholders; and if all the shareholders consent to waive that protection, it is competent to them to do so. The case really depends not on the law relating to illegal contracts, but on the application of the doctrine of ultra vires. The true application of that doctrine is only between the shareholders and directors: *Prince of Wales Assurance Co. v. Harding* (2); *Taylor v. Chichester and Midhurst Ry. Co.* (3), per Willes and Blackburn, JJ.; *Ayers v. South Australian Banking Co.* (4) But if it has any application as against third persons, it only applies where they ought to have known, or had reason to believe, that the contracts were beyond the power of the directors to make. If they are such as might have been made, third persons contracting with the company are not bound to inquire whether all the preliminaries required by the constitution of the company have been performed; they are entitled to assume that they have been, and the Court will presume everything in their favour: *Royal British Bank v. Turquand* (5); *Agar v. Atherton Life Assurance Co.* (6); *Prince of Wales Assurance Co. v. Harding* (2); *Totterdell v. Fareham Blue Brick Co.* (7); *Re*

(1) 5 B. & S. 588; 33 L. J. (Q. B.) 268.

(2) E. B. & E. 182; 27 L. J. (Q. B.) 297.

(3) Law Rep. 2 Ex. 356, at pp. 379, 389.

(4) Law Rep. 3 P. C. 548.

(5) 6 E. & B. 327; 25 L. J. (Q. B.) 317.

(6) 3 C. B. (N. S.) 725; 27 L. J. (C. P.) 95.

(7) Law Rep. 1 C. P. 674.

*Athenæum Life Assurance Co.* (1); *Re British Provident Life and Fire Assurance Co., Grady's Case* (2); *Lane's Case* (3); *Fountaine v. Carmarthen Ry. Co.* (4) Now, in the present case, by the joint operation of the memorandum and the 4th clause of the articles of association, these were contracts which the company might have validly made if the necessary preliminaries had been complied with; as against third persons therefore they are bound by them.

Thirdly, if not originally binding, it was competent to all the shareholders to ratify them, and they have done so. That they could do so is established by *Evans v. Smallcombe* (5); that they have done so in fact is shewn by the reasoning in that case and in the cases of *Laird v. Birkenhead Ry. Co.* (6); *Crook v. Corporation of Seaford* (7); *Phosphate of Lime Co. v. Green.* (8) The shareholders must all be presumed to have received the balance sheets and the circulars announcing the meetings; and the state of the accounts, and the reference to disputes and to the report of the committee of investigation, contained in the circular calling the meeting of the 14th of May, 1867, were sufficient to put them on inquiry, and make it their duty to acquaint themselves with what was going on; and if with this notice they absented themselves from the meeting, they must be taken to have assented to whatever arrangement the meeting might sanction. That the ratification was not communicated to the plaintiff is of no consequence. Ratification gives the same effect to a contract as previous authority; if an agent has authority in fact, it makes no matter whether that fact has or has not been communicated by the principal to the other contracting party, and it is of equally little consequence, where the agent has acted without authority, whether the principal communicates the adoption of his agency; it is sufficient if he has taken the benefit of the contract: *Soames v. Spencer* (9); *Walter v. James* (10); *Ramazotti v. Bowring.* (11) Nor does it make any

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(1) 4 K. & J. 549; 27 L. J. (Ch.) 829.

(2) 1 De G. J. & S. 488; 32 L. J. (Ch.) 326.

(3) 33 L. J. (Ch.) 84.

(4) Law Rep. 5 Eq. 316.

(5) Law Rep. 3 H. L. C. 249.

(6) 29 L. J. (Ch.) 218.

(7) Law Rep. 6 Ch. Ap. 551.

(8) Law Rep. 7 C. P. 43.

(9) 1 D. & R. 32.

(10) Law Rep. 6 Ex. 124.

(11) 7 C. B. (N.S.) 851; 29 L. J. (C. P.) 30.

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difference in this respect whether there has been a previous repudiation; *Bird v. Brown* (1) only shews that ratification cannot override previous transactions so as to make the act of a stranger wrongful, but there is no rule to prevent a person from cancelling his own act of repudiation by a subsequent ratification.

Fourthly, the company are estopped by the deed of December, 1867, from setting up this defence. They have agreed to allow the purchaser to use their name as plaintiffs or defendants; they are only nominal parties, the real defendants being the purchasers, from whom the company have taken such an indemnity as they deemed sufficient, and to set up the defence of ultra vires is a fraud on the plaintiff. It might be open to a shareholder to restrain the execution of the contract by the company, but the company are estopped from using this defence.

*Watkin Williams, Q.C.*, in reply.

*Cur. adv. vult.*

June 20, 1874. The following judgments were delivered:—

BLACKBURN, J. (2) The Ashbury Company are a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89). The memorandum of association states (as was required by the 8th section of the Act), the object for which the company is established. The articles of association (3) which it is material to notice are those numbered 3, 4, and 5.

Up to a certain extent I believe there is no doubt as to the effect of the incorporation of a company under the Companies Act of 1862. The company is a corporation, and it is a partnership for trading purposes, for the objects for which the company is established. And by the articles in this case, as in almost all others, the management of the company's business is confided

(1) 4 Ex. 786.

(2) Brett and Grove, JJ., concurred in this judgment.

(3) These articles were as follows:—  
“3. The company's business shall be conducted exclusively by or under the supervision of the directors or board according to these presents. 4. An extension of the company's business beyond or for other than the objects or

purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution. 5. No person except the directors or a person from time to time expressly authorized by these presents or by a board so to do, shall have any authority to enter into any contract so as to bind the company thereby.”

exclusively to a board of directors. And I apprehend that it is clear that this board have the same authority to bind the company in the managing the company's business that a partner or manager in an ordinary partnership, established at common law for the same objects, would have to bind the firm; an authority which to be valid must be exercised in cases within the scope of the ordinary business and transactions of the firm: see Story on Partnership, ss. 110, 111, 112, 113. If the board in a joint stock company, or a partner in a common law partnership, make a contract beyond their authority, it does not bind the company in the one case, or the firm in the other. This is only applying the general law as to principal and agent to the particular case of a board acting as agents for an incorporated company. So far I believe there is no difference of opinion.

But if a partner, in a firm established under the common law, professes to bind his firm to an extent beyond his authority, the other members of the firm, though not bound by his unauthorized contract, may adopt and ratify it, and if they do the firm is bound.

It is obvious that in many cases it may be judicious to adopt an unauthorized contract and make the best of it. In many others it may be injudicious so to do. On that each individual partner must form his own opinion. And as the partners do not confer on each other authority to ratify contracts which they did not give each other authority to make, the ratification, to bind the firm, must be shewn to be made by the authority of each individual partner. No majority of partners, however great, can bind the minority. If even one partner does not ratify, then, though all the rest agree, the firm is not bound. This again, is only applying the general law of agency to the particular case of a partner acting as agent for the firm.

The question on which there is doubt and difficulty is, whether in the case of a company incorporated under the Companies Act, 1862, the unanimous shareholders can ratify a contract made in the name of the company, but beyond the authority of those who made it. That question must ultimately depend on the true construction of the Act of Parliament. Had the legislature thought fit to enact in clear language either that all contracts, made by or on behalf of a company incorporated under the Act beyond the

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scope of the objects for which it was established, should be absolutely void, or expressly to enact that contracts though beyond the scope of those objects should be valid if either previously authorized, or subsequently ratified by all the shareholders, our task would simply be to carry out that expressed intention of the legislature. But there is no express enactment either one way or the other in the Act of Parliament, and we must therefore interpret the Act for ourselves.

I will endeavour to do so later, but I now proceed to shew how, in fact, the question arises in the present case. The board entered into contracts called in the case contracts A, B, C, and D, and in October, 1865, entered into further contracts, called in the case X, Y, and Z, modifying those. If those seven contracts had been such that the board of directors had authority to make them on behalf of the company, the plaintiff would clearly be entitled to recover. But I think that, looking at those contracts as a whole, they are not within the scope of the objects for which the company was established, as disclosed in the memorandum of association. I do not enter on this part of the subject, as it is fully, and, to my mind, satisfactorily disposed of by Bramwell and Channell, BB., in their judgments below, and by my Brother Archibald in his judgment in this case, which I have perused, and I believe there is not any difference of opinion on that part of the case amongst the judges in the Court of Error.

I think, and start with the assumption, that the company was not in October, 1865, bound by those contracts, though entered into by the board in its name, on the ground that the board had exceeded its authority. But it is contended that the whole of the shareholders in the company have ratified the contracts. And whether or no that ratification is made out is a question of fact, which we have to decide on the statements in the case, with power to draw inferences.

I think we have much reason to complain of the way in which the case is stated on this point; and I have had some doubt whether we ought not to send down the case to be restated. But on the whole I think enough appears to lead me to find this fact in favour of the plaintiff.

It appears that the board of directors had advanced on the con-

tracts, and on some Spanish contracts of a similar kind, a large sum of money. In their balance sheet, dated the 30th of September, 1865, they take credit amongst other items for

“Advances on Contracts,

	£	s.	d.
Madrid, Placentia, and Malpartida Railway . . . . .	41,338	11	6
Anvers, Douai, and Tournai . . . . .	27,191	14	8”

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and this balance sheet was circulated amongst the shareholders. At the annual meeting, held on the 5th of December, 1865, a dividend of 14 per cent. was declared, and was, no doubt, accepted by every shareholder. Now, if I could see that the entry in the balance sheet, above quoted, should have conveyed to the mind of an ordinary shareholder that the board had entered into contracts ultra vires with the Belgian Railway, and that the large dividend declared was earned in part out of these unauthorized contracts, I should have no hesitation in drawing the conclusion that the acceptance of that dividend did amount to a ratification of those unauthorized contracts, whatever they might be.

But though the large item thus vaguely described might lead a good man of business to ask for explanation, I do not think it would convey to the mind of an ordinary shareholder any such information as to justify me in drawing the inference that each such shareholder adopted the transactions with the Belgian Railway, knowing them to be beyond the authority of the board.

Before the next annual meeting of the company times had changed. Instead of a flourishing report, and a dividend of 14 per cent., a circular was sent, informing the shareholders that the meeting would be held pro formâ, and adjourned to a day of which notice would be given. It was, in fact, ultimately held on the 14th of May, 1867. This circular was sent in consequence of a resolution passed at a special general meeting, held on the 20th of December, 1866, at which a committee was appointed to inquire, and report at an early meeting of the shareholders.

I draw the inference of fact that the circular was duly sent; and I further think that every shareholder who received such a circular must now have been aware that something was wrong, and has himself only to blame if after this he failed to learn what was the report of the committee of inquiry.

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That report was presented at an extraordinary meeting of the company, held on the 1st of May, 1867.

This report incidentally refers to negotiations between the board and some individuals, directors and shareholders, and to the circulation among the shareholders of a prospectus and circular letter. These are matters which might or might not be material if we knew what they were, which the case as drawn does not tell us. But this much is obvious to any one who reads the report, that the board had entered into contracts in Belgium which the committee were advised were beyond the authority of the board. That under those contracts a large sum belonging to the company had been advanced in Belgium which, as the committee were advised, could not be recovered back from the Belgians. That the committee thought the directors might be made personally liable in Chancery, and that proposals had been made for a compromise between the directors and the company on the basis of a transfer of the liability and advantage of these contracts.

And the committee wind up their report by saying that "looking at the important interests involved, and the extent to which they would be jeopardised by proceedings in Chancery extending over a considerable period, they would recommend the shareholders to endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings."

At the meeting on the 1st of May, 1867, a committee was accordingly appointed "to confer with the directors with the view to an agreement being arrived at on the matters in dispute."

On the 14th of May, 1867, the general meeting adjourned pro formâ in December, 1866, was convened by a circular letter mentioning among the agenda :

"To receive, consider, and, if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting held on the 1st of May instant to confer with the directors with a view to an agreement being arrived at on matters in dispute."

The balance sheet which accompanied this circular shewed a loss, and the directors' report also accompanying it declared that there was no dividend. These are matters intelligible to, and likely to rouse attention in, the dullest and most careless of share-

holders. I certainly, therefore, feel justified in saying that there is a *primâ facie* case that every shareholder knew what it was proposed to do. I do not say that it is conclusive. A shareholder might have been dangerously ill during the whole of these six months, so as to be incapable of attending to business, and other exceptional cases might exist. But the defendants have a strong interest in proving that there was even one shareholder who did not know what was going to be considered, or who afterwards disapproved of what was actually done, and they have made no attempt to prove it.

At the meeting held on the 14th of May, 1867, a resolution was come to [see post, pp. 280-282].

The sale to the purchasers of the company's interest in the contracts does of necessity involve in it a ratification of those contracts, and if the purchasers were solvent persons, which, at all events, they were believed to be, it was very much for the interest of the company that such a sale should be made. I am, therefore, not surprised at finding that those who defend the action have been unable to find a single shareholder to give evidence that he did not assent to or, even now, disapproves of that sale. I draw the inference of fact that each individual did assent to it.

In the circular letter convening the next general annual meeting, held on the 24th of December, 1867, among the agenda was "to consider and, if so determined, to sanction a contract which has been entered into by the company with the directors thereof in pursuance of a resolution passed at the last annual meeting, held on the 14th of May, 1867."

At this meeting a formal indenture was produced. [See this indenture, post, p. 282, n. (1)]. By the first clause, the Ashbury Company assigns to the purchasers all benefit which the company has, or is supposed to have, in the Belgian railways, and all contracts, and the benefits of all sub-contracts that have been made, or expressed to be made, in connection therewith. And by the sixth clause the company are to allow their name to be used by the purchasers either as plaintiff or defendant.

By the last clause it is agreed that nothing shall preclude the company from maintaining that such contracts are *ultra vires*. This last clause may be effectual as between the company and the

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purchasers, and may, therefore, avail the company in any future proceedings against the directors for breach of trust; but it cannot, in my opinion, prevent the operation of the deed as a ratification of the contracts.

I think that it is not competent for a person, in whose name a contract has been made without authority, to sell the benefit and advantage of that contract, and to authorize the purchasers to sue in his name in order to obtain that benefit, if the contracts should prove advantageous, and at the same time to reserve power to repudiate the contract if it prove a losing contract.

I think that the act of selling the contract is an unequivocal act of election to ratify and adopt it, and that election being once made it is determined for ever.

At the meeting a formal resolution was passed that the seal of the company should be affixed to this indenture, which was accordingly done.

It was argued before us that all this came too late, because, as is stated in the case, early in May, 1866, the directors of the company repudiated all further performance of the above contracts, on the grounds that they were ultra vires, and my Brother Bramwell, in his judgment below, seems to adopt this view, as he says (ante, p. 235), "If it was ratified it was between the 5th of December, 1865, and May, 1866."

I however, do not agree in this. I think that when the plaintiff thus had notice from the directors that they had exceeded their authority and that the company were not bound, the plaintiff might, if he pleased, have declared himself no longer bound; and I think that if he had done so, a ratification would have come too late to bind him.

But he did not do so; and as long as he continued insisting on the contract as a binding one, the company might adopt the contract if for their benefit. This, I think, is clear on principle, and the case of *Soames v. Spencer* (1), cited in the argument, is an authority in support of it.

It seems to me, therefore, that in this case there has, in fact, been a complete and deliberate ratification of this contract, under the seal of the company, affixed to the ratification in pursuance

(1) 1 D. & R. 32.

of the resolutions of two successive meetings of the company convened for the express purpose; and that as a fact there is no shareholder in a position to object to that ratification, every one either having previously assented to that ratification or subsequently approved of it.

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I do not think it is sufficiently made out that there was any ratification before 1867, but then there was a complete one. I have only further to observe that there is a technical difficulty as to binding a body corporate at law otherwise than by its seal. I should require further consideration before I decided that a ratification by each individual of the whole shareholders, even at law, must be inoperative unless declared by it under its seal; and I should also require further consideration before I decided whether, at law, it was competent for the corporation to set up as a defence that the seal was affixed without the assent of every one of the shareholders; but on the view I take of the facts neither question arises in this case. I therefore come to the conclusion that if, in any case, a company formed under the Companies Act, 1862, can ratify a contract made beyond the scope of the objects for which it is formed, this company has done so.

If this view of the facts is correct it becomes necessary to decide the question of law, viz. whether a corporation constituted under the Companies Act, 1862, can, even under seal, bind itself in its corporate capacity, by a contract for objects beyond the scope of those specified in its memorandum of association as the objects for which it is established. My late Brother Channell, in his judgment in the case below, says: "In some of the earlier cases quoted in the argument in which questions were discussed relating to contracts ultra vires of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity, by their individual assent to contracts not authorized by the memorandum of association or other like instrument by

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which the constitution of the company is defined. The objection to such a contract is not that it is illegal and therefore unenforceable, but simply that it is unauthorized by the body whom it purports to bind."

The more recent authorities referred to are, I presume, the three cases of *Spackman v. Evans* (1), *Evans v. Smallcombe* (2), and *Houldsworth v. Evans* (3), decided in the House of Lords in 1868, and the *Phosphate of Lime Company v. Green* (4), decided in the Court of Common Pleas in 1871.

In the cases in the House of Lords the company had been incorporated under the Act 7 & 8 Vict. c. 110. In the case in the Court of Common Pleas the company was incorporated under the present Act of 1862.

It is, I think, too much to say that these cases clearly settle the point. Instead of saying that these cases clearly settle that the law is as my Brother Channell says, I only say that I *think* them authorities to that effect, and that I *think* such is the law. With this slight alteration I agree entirely with what is above quoted.

I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified.

But it is of great importance, when we come to construe a statute creating a corporation, to consider what would be the incidents at common law conferred on a corporation created by charter.

The leading authority on this subject is the case of *Sutton's Hospital*. (5) There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict (6), by which the King incorporated the first governors of the Charterhouse, and expressly

(1) Law Rep. 3 H. L. C. 171.

(2) Law Rep. 3 H. L. C. 249.

(3) Law Rep. 3 H. L. C. 263.

(4) Law Rep. 7 C. P. 43.

(5) 10 Co. 1.

(6) 10 Co. 10 b.

provided, 1. That they should have power to purchase, &c., as well goods, chattels, &c., as lands. 2. To sue, and be sued. 3. To have a common seal, "whereby the same corporation shall or may seal any manner of instrument touching the said corporation and the manor, lands, &c., thereto belonging, or in any wise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, &c., of the said incorporation or any estate, &c., shall be conveyed, &c., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereafter expressed, and not otherwise." The King, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbade any alienation except by lease. But the resolution of the Court, as reported by Coke (at p. 30 b), was that "when a corporation is duly created all other incidents are tacite annexed; . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1. by the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law."

This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.

If there are conditions contained in the charter that the cor-

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poration shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by *sci. fa.* in the name of the Crown to repeal the letters patent creating the corporation: see *Reg. v. Eastern Archipelago Company*. (1) But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation.

I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, shew an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the legislature to prohibit, and so avoid the making of, a contract of this particular kind?

I think this is the real question, and for that I refer to the judgment of Parke, B., in *South Yorkshire Ry. Co. v. Great Northern Ry. Co.* (2), and the various other cases cited by my late Brother Willes and by myself in *Taylor v. Chichester and Midhurst Ry. Co.* (3)

And when we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke says, "It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law:" 2 Inst. 200. Affirmative words may

(1) 2 E. & B. 857; 22 L. J. (Q.B.)  
196.

(2) 9 Ex. 55, 84; 22 L. J. (Ex.)  
305, 313.

(3) Law Rep. 2 Ex. at pp. 375, 389.

no doubt be used so as to imply a negative, see Plowden, Com. 113, but I take it the general principle is that thus laid down by Cresswell, J., in the *Eastern Archipelago Company v. Reg.* (1), "that to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain."

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I now come to consider the construction of the Act of 1862, under which the present company is formed. The sections of the Act of 1862 bearing on the present case seem to me to be only ss. 6, 8, 9, 10, and 12.

By the 6th section of the Act of 1862, any seven persons may, by subscribing their names to a memorandum of association; and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability.

The 8th, 9th and 10th sections provide that the memorandum of association shall contain the objects for which the proposed company is to be established.

The 12th section provides that the company may make certain specified alterations in the memorandum of association, not including a change in the objects for which the company is to be established, and then, in express negative words, provides that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association."

The objects of the proposed company must, therefore, always remain the same; and that has, I think, two important effects. First. I think that if the company, as a body, propose to do anything beyond these objects, any one dissentient shareholder (who has not precluded himself from doing so) may prevent it from doing so.

Secondly. No person can be entitled to fix the company with a contract made by the board for any purpose beyond those objects, on the ground that the board had an ostensible or apparent authority to make contracts of that kind, but must, in order to fix the company, at least prove an actual authority given to the board to make the particular contract he seeks to enforce.

Now, if I thought that it was at common law an incident to a

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corporation that its capacity should be limited to the extent conferred on it by the instrument creating it, I should agree that the capacity of a company incorporated under the Act of 1862 was limited to the objects in the memorandum of association. But if I am right in the opinion which I have already expressed, that the general power of contracting is an incident to a corporation which it requires an indication of intention in the legislature to take away, I see no such indication here. There are not even affirmative words, those used in s. 25 of 7 & 8 Vict. c. 110, to which I shall now refer, having been (I presume advisedly) not repeated.

The 7 & 8 Vict. c. 110, s. 25, enacts that from the date of the certificate the shareholders shall be incorporated "by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this Act and of such deed as aforesaid." And then express powers are given to the company to enter into contracts for any "necessary purpose of the company."

I think if the question was whether the legislature had conferred on a corporation created under this Act capacity to enter into contracts beyond the provisions of the deed, there could be only one answer. The legislature did not confer such capacity.

But if the question be, as I apprehend it is, whether the legislature have indicated an intention to take away the power of contracting which at common law would be incident to a body corporate and not merely to limit the authority of the managing body and the majority of the shareholders to bind the minority, but also to prohibit and make illegal contracts made by the body corporate in such a manner that they would be binding on the body if incorporated at common law, I think the answer should be the other way. There certainly is ground for suspecting that the person who framed the Act 7 & 8 Vict. c. 110, thought that the corporation would have no other powers than those thus expressly given to it, and perhaps meant to restrict its powers accordingly, but when we remember the canon of construction that affirmative words do not take away the common law right, I think he has not used words sufficient to effect such a purpose. It

would be different if negative words had been used, and it had been said that the company should not do any other acts than those necessary for the purpose for which it is formed.

The two Acts, 7 & 8 Vict. c. 110, and the Act of 1862, are so much in *pari materiâ*, that if it had been settled by judicial construction that a company under 7 & 8 Vict. c. 110, was forbidden to make any contract for objects beyond those specified in the deed, I should endeavour to put the same construction on the Act of 1862, unless the change in the language shewed an intention in the legislature to alter the law.

There are many dicta in courts of equity, worthy of great respect, which indicate an opinion not only that such acts are beyond the authority of the board, or even of a majority of the shareholders, but also that they are beyond the capacity of the company though unanimous.

These are worthy of great attention; but I can find no case in which it has been decided that a contract so made or ratified by the whole company that it would have bound the company in its corporate capacity (but for the provisions of the statute), has, either at law or in equity, been held void on account of the provisions of that Act. And I think that the three cases, already referred to, of *Spackman v. Evans* (1), *Evans v. Smallcombe* (2), and *Houldsworth v. Evans* (3), all decided in the House of Lords, are at least authorities for the contrary doctrine.

The question in all three cases was, whether a person, who had many years ago *de facto* retired from the company under an arrangement made with the directors, was still a shareholder in point of law, and therefore ought to be put on the list of contributories.

In all three cases it was agreed that it was beyond the competence of the board of directors, or even of a majority of the shareholders, to allow such a retirement. In *Spackman's Case* (1), the majority of the Lords, Lords Cranworth, Chelmsford, and Colonsay, thought it not proved that the whole body of shareholders had ratified the arrangement under which Spackman went out, and consequently he was retained on the list of contributories, Lord St. Leonards and Lord Romilly, dissenting.

(1) Law Rep. 3 H. L. C. 171.

(2) Law Rep. 3 H. L. C. 249.

(3) Law Rep. 3 H. L. C. 263.

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In *Smallcombe's Case* (1), the majority of the Lords, Lord Cairns and Lord Cranworth, thought it was sufficiently proved that all the shareholders had ratified the arrangement under which Mr. Smallcombe went out, and consequently he was removed from the list of contributories, Lord Chelmsford dissenting.

In *Houldsworth v. Evans* (2) the majority of the Lords (Lord Cairns and Lord Chelmsford) thought it not sufficiently proved that the arrangement under which he retired was brought to the notice of all the shareholders, and consequently he was retained on the list of contributories, Lord Cranworth dissenting.

The differences of opinion, though chiefly on the questions of fact, were sufficient to secure that the cases should be very carefully considered, and consequently all that is said in them is of high authority.

In the first of the cases, *Spackman v. Evans* (3), all the Lords who formed the majority based their decisions on the absence of satisfactory proof that the arrangement was ratified by all the shareholders. Lord Cranworth says, p. 190: "The act of the directors in cancelling the shares of the appellant, though not warranted by the deed of settlement, would be valid if it was either previously authorized or subsequently ratified by all the shareholders." And at p. 194 he says: "Looking at all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular, that is, knew that they were acts not authorized by the deed, and not done in pursuance of the notice given to every shareholder by the circular of the 4th of November, 1848."

It certainly seems to me, that, when using this language, Lord Cranworth had in his mind the words of the 25th section of 7 & 8 Vict. c. 110, previously quoted, and meant to express an opinion that the acts of the directors not authorized by the provisions of the deed were illegal in them, but were capable of ratification by the corporation. Lord Chelmsford also says, p. 234: "It is quite clear that to render valid an act of the directors of the company

(1) Law Rep. 3 H. L. C. 249.

(2) Law Rep. 3 H. L. C. 263.

(3) Law Rep. 3 H. L. C. 171.

which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz. the acquiescence of each and every member of the company."

Lord Colonsay also dwells on the absence of proof of knowledge on the part of the shareholders, though I do not think his language indicates so strongly that he thought that this, if proved, would have been decisive in Spackman's favour.

In the subsequent case of *Evans v. Smallcombe* (1), Lord Cairns says (speaking of *Spackman v. Evans* (2)), "I apprehend I am correct in stating that it was the opinion of the majority of your lordships in that case, indeed, I think it was the opinion of all your lordships who were present, that, looking to that arrangement, which has been called throughout in this case the Chippenham arrangement, it would have been competent for any shareholder in the company to object within a reasonable time to that arrangement, that the arrangement was one which was ultra vires of the directors, and which, if supported at all, could only be supported by reason of the consent or acquiescence of all the shareholders in the company, or by the proof of such a state of facts as would lead to the reasonable inference that there had been that consent or that acquiescence."

These cases decided in the House of Lords are binding on us as far as they go. I agree that they do not precisely decide the very question before us. In the first place they were decisions as to a company incorporated under 7 & 8 Vict. c. 110, which differs in its language from the Act of 1862. It seems to me that the difference in the wording of the two Acts is such that it is more plausible to say that 7 & 8 Vict. c. 110, is prohibitive, than to say that the Act of 1862 is so. In the next place, the question raised was whether a particular person was to be inserted on the list of contributories, which, as pointed out by Lord St. Leonards, is an equitable question, and in a court of equity the distinction between the body corporate and the whole of the individuals who, in the aggregate, form that body corporate, is not so important as in a court of law. The present question is a purely legal one, viz., whether the body corporate is bound by this contract. But I

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(1) Law Rep. 3 H. L. C. 249, at p. 253.

(2) Law Rep. 3 H. L. C. 171.

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take it that the question whether the statute 7 & 8 Vict. c. 110, rendered a proceeding beyond the provisions of the deed illegal, that is, *malum prohibitum*, is the same in equity as at law. The act, illegal in that sense, could no more be adopted and set up in equity than at law; and I therefore apprehend these cases do decide conclusively that an arrangement such as that come to in *Evans v Smallcombe* (1) was not forbidden by the statute 7 & 8 Vict. c. 110.

It was argued by the counsel for the defendants before us that the object there was to enable one of the partners to retire, which might have been done consistently with the provisions of the deed in some other way; and perhaps that it fell within the general power given to companies in the twelfth subsection of s. 25—viz. “to perform all other Acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do.” Lord Romilly, who was one of the dissentient minority in *Spackman v. Evans* (2), says: “Of course, if this company had bought mines, or entered into a contract to set up a steam-packet business, this would have been simply void, and would not have bound the company or any one, because they could do nothing that was beyond the objects of the company;” which may be construed as indicating that he had some such distinction in his mind. I think, however, when looked at with the context, he must be understood as merely saying that the arrangement was voidable, not void, standing good till some one entitled to do so took steps to avoid it, whilst such an act as he supposed would be void till affirmatively ratified. With this exception I have looked through the opinions delivered in the House of Lords without finding anything to indicate that such a distinction was in the mind of any one of the noble and learned lords; and I think that we should hardly be following out the ratio decidendi of the majority of the House of Lords if we acted on such a distinction.

I do not think we can properly enter on the consideration of what it would have been politic in the legislature to enact. If we could do so, I think much might be said on both sides.

I am impressed with the hardship on incoming shareholders,

(1) Law Rep. 3 H. L. C. 249. (2) Law Rep. 3 H. L. C. 171, at p. 244.

who, it is said, have a right to believe that the company is carrying on the business for which it is formed and no other. And though, of course, if the property of the company has been already squandered on unauthorized transactions or embezzled, the incoming shareholder must bear that loss; yet it is hard on him to be made liable to a contract beyond the objects of the company, even though that contract must by supposition have been ratified by the outgoing shareholders through whom he derives title.

On the other hand, it may often happen that when the shareholders first learn that the unauthorized contract has been made, their capital may be already so inextricably engaged in it that to stop the contract would be certain ruin, and to go on would give a very fair prospect of extricating themselves without much loss, perhaps with profit.

And the recent cases in the House of Lords shew what very great hardships may fall on third persons if a transaction is always to be held void, though ratified by the whole shareholders.

And I do not see any risk of a company practically carrying on business for other objects than those named in the memorandum. The difficulty of obtaining the assent of all shareholders, and of proving that it had been obtained, is so great that no sensible man would trust to that and deal with the company on those terms.

But I do not think that we can ask what ought to have been enacted by the legislature. Our duty is to declare what has been actually enacted.

And I think, for the reasons I have above given, that in this case the unanimous shareholders have in fact assented to the ratification under the seal of the company of this contract; and that such a ratification, at all events, makes the contract binding on the company in its corporate capacity.

I think, therefore, that the judgment of the Court below should be affirmed.

My Brothers Brett and Grove agree in this judgment.

As this Court is equally divided, the judgment appealed against must be affirmed.

ARCHIBALD, J. (1) This is an action by the plaintiff, as sur-

(1) Keating and Quain, JJ., concurred in this judgment.

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viving partner in the firm of Riche Brothers, railway contractors, domiciled at Brussels, to recover from the defendants damages for the breach of certain contracts of the 30th of January and the 14th of October, 1865.

The case comes before us on error from the Court of Exchequer. The facts are set out in a special case and appendix, the Court having power to draw inferences of fact; and the question submitted is, whether the plaintiff is entitled to recover any damages from the defendants. The judgment of the Court below was in favour of the plaintiff, the majority of the Court being of opinion that the question should be answered in the affirmative.

The defendants are a limited company, incorporated in September, 1862, by the name of the Ashbury Railway Carriage and Iron Company, under the Companies Act, 1862. By the 3rd clause of their memorandum of association, the objects of the company are thus stated:—

“3. The objects for which the company is established are, to make, or sell, or lend on hire railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.”

By article 4 of the articles of association it is provided that “an extension of the company’s business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution.” No special resolution was ever passed in the terms of that article, and there has been therefore no modification or extension of the objects of the company as set forth in the memorandum of association.

It appears by the articles of association that the company had purchased of John Ashbury the business carried on by him at Openshaw and Ardwick, in the county of Lancashire, which business was the building of railway carriages and waggons, and the making of turntables, points, crossings, and roofs, but it had never been extended to the construction of railways, or the supply of money for such construction.

By the agreement John Ashbury engaged to accept the office of managing director of the company for the space of one year at least. The company having been thus constituted it appears that on the 14th of March, 1864, the Belgian Government had granted to Messrs. Gillon & Baertsoen (subjects of Belgium) a provisional concession (which afterwards became absolute) for the construction of a line of railway in Belgium, from Antwerp to Tournai, which it was expected would be continued to Douai, in France, with the option of taking a further concession of such part of the line to Douai as would be within the Belgian frontier. The concessionaires had power to transfer the concession to a third party.

By the terms of the concession the sum of 20,000*l.* was to be deposited as caution money. Of this sum the concessionaires had, before the month of January, 1865, deposited 1000*l.* They had also, prior to the date of the concession, entered into a contract with Messrs. Riche (the plaintiff and his deceased partner) for the construction of the railway from Antwerp to Tournai and its two branches, with all accessories, and for the supply of the rolling and fixed plant for the sum of 806,604*l.*, of which they were to receive in bonds 500,924*l.*, and in shares of a société anonyme 305,680*l.* The concession operated as a lease of the enterprise to the concessionaires for the period of ninety years (articles 34, 35), during which period they would continue liable to the Belgian government for the performance of the conditions stipulated in the grant. But the concessionaries were at liberty to assign their rights and transfer their obligations to a société anonyme to be constituted in accordance with the law of Belgium, who were in that event to be substituted for them, as if the concession had been granted to such society directly.

The facts in connection with this concession having come to the knowledge of Mr. James Ashbury, then assistant acting director of the Ashbury Company, it occurred to him that a large profit was to be made out of the concession if the construction of the line and the supply of the fixed and rolling stock were carried out by Messrs. Riche Brothers on the terms so agreed upon between him and Messrs. Gillon & Baertsoen, and that it would be desirable to secure the concession for the Ashbury Company. Accordingly, negotiations were entered into by him (assuming to act on behalf

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of the Ashbury Company) and the parties in Belgium, and after a report by him on the subject to the directors of the Ashbury Company, he was eventually, by a resolution of the board of directors, passed on the 19th of January, 1865, authorized to conclude any contract having reference to the concession of the Antwerp, Tournai, and Douai Railway, subject to the ultimate approval of the board, and was supplied by the directors with 26,000*l.* of the money of the company for the purpose of paying 20,000*l.* in respect of the deposit or caution money, and 6000*l.* to the concessionaires on account of the sum to be ultimately received by them for the transfer of the concession. He accordingly proceeded to Brussels, and there, on the 30th of July, 1865, the contracts described in the case as A, B, C, and D were entered into by him in the name and professing to act as the agent of the Ashbury Company.

The first of these contracts, A, recites generally the facts in connection with the concession, and the obligation of the concessionaires towards the government. It also refers to the agreement between the concessionaires and Messrs. Riche Brothers for the construction of the line, and then proceeds to assign the concession to the Ashbury Company in such wise, "that they shall be to all intents and purposes in the lieu and stead of Messrs. Gillon & Baertsoen." In consideration of this transfer the company undertake to reimburse to Gillon & Baertsoen the amount of the caution money (1000*l.*) already paid by them, and to pay the residue of the caution money to the government, and to pay to Gillon & Baertsoen 1,752,630 francs (including the caution money) half in money and half in paid-up shares of a société anonyme to be formed, and they also bind themselves to perform in all respects the engagements, charges, and obligations entered into by Messrs. Gillon & Baertsoen both with the Belgian government and with Messrs. Riche Brothers. They also engage to constitute a société anonyme according to the law of Belgium, with a capital of a stipulated amount by which the execution of the line was to be secured, Messrs. Gillon & Baertsoen agreeing to concur with the defendants in a transfer of the concession to the proposed society, so that Messrs. Gillon & Baertsoen should be released from their obligations towards the state.

The agreement also contained stipulations with respect to the

option of taking the concession of the section on the Belgian frontier, to which, however, it is unnecessary to refer.

The contract B purported to be made between the proposed société anonyme and Messrs. Riche Brothers, and embodied the terms upon which the latter were to undertake the construction of the line, and James Ashbury, among others, having accepted the functions of a director of the proposed société anonyme; undertook when that society was finally constituted to accept and sign the agreement in the name of the Ashbury Company, so as to make it binding. It may be as well to mention here that the société anonyme was afterwards, on the 27th of October, 1865, duly constituted, that Messrs. Riche declared that they accepted the contract for construction of the line, and that the contract B was approved and ratified on behalf of the society.

The contract C purported to be made between the Ashbury Company, represented by Mr. James Ashbury, their assistant managing director, on the one part, and Messrs. Riche Brothers on the other part. After reciting the concession and its transfer, and the agreement between Riche Brothers and Messrs. Gillon & Baertsoen, of the 28th of April, 1863, it proceeds to define the terms as between the Messrs. Riche Brothers and the Ashbury Company, on which the former are to construct the railway, and the manner in which payments are to be made by that company to the société anonyme, for the benefit of Messrs. Riche Brothers.

By this agreement the Ashbury Company undertake to supply the fixed and rolling stock of the said intended railway (thus liberating Messrs. Riche Brothers' firm from so doing), and to make payments at certain agreed rates to the société anonyme for the benefit of Messrs. Riche Brothers.

By contract D, purporting to be made between Riche Brothers and the Ashbury Company, the latter re-conveyed to Messrs. Riche Brothers the contract for the rolling stock, in consideration of deductions to be made from the amount to be paid by the Ashbury Company to the société anonyme.

The reasons for this modification of the arrangements are explained in paragraph 13 of the case. (1)

(1) Paragraph 13. "The reason for the arrangement contained in D, as stated by the said Mr. James Ashbury to his directors, was that the minister

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On the signature of these contracts, Mr. James Ashbury paid over the 20,000*l.*, as stipulated, and a subscription was made in the name of the Ashbury Company, of 60,000*l.* towards the required capital of the société anonyme.

Mr. James Ashbury, on his return, made, on the 8th of February, 1865, a written report to a board meeting of what had been done. The report was approved and confirmed by the board, and, together with a guarantee of a company called the Plant Company (to which it is not necessary to make any further reference), and the contract with Messrs. Riche Brothers, was ordered to be registered and preserved in the office of the company at Openshaw.

At this stage, the board of directors of the Ashbury Company entertaining doubts as to their power to bind the company by such contracts, proposed to transfer the liability and advantage of these contracts to some other company existing or to be formed for the purpose; but before this scheme had made much, if any, progress it was suspended or abandoned.

In the months of July, August, and September, 1865, the plaintiff made the necessary plans and surveys for constructing the line of railway, and Mr. McCandlish was appointed by the directors of the Ashbury Company chief engineer of the line, and was afterwards, on the 4th of October, 1865, accredited by them to the plaintiff as the engineer with whom he might arrange all details, and by whom his plans were, if necessary, to be approved.

Early in October, some modification of the existing agreement being deemed necessary, the board of directors of the Ashbury Company sent Sir Cusack Roney and Mr. Tahourdin, their solicitor, over to Brussels with authority from the board to make final arrangements in relation to the contracts of the 30th of January,

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would not allow the proposed rolling stock for the line to enter Belgium free of duty, and that the proposed prices for such rolling stock would therefore not be such as would leave a profit to the defendants, and that he therefore proposed to Messrs. Riche Frères that they should manufacture their own stock, or sublet it in Belgium, and pay the defendants for the profit they would

have had if the plant had been constructed at Openshaw. Ultimately the arrangement was that Messrs. Riche should provide the stock and take all responsibility thereon, and that the Ashbury Company should receive as compensation the sum of 20,000*l.* in shares at par, such shares, of course, bearing no interest during construction."

1865; and on the 14th of October, 1865, Sir Cusack Roney, in the name, and professing to act as the agent of, the Ashbury Company, entered into the contracts referred to in the special case, as marked X, Y, and Z.

Contract X purports to be made between Messrs. Gillon & Baertsoen of the first part, the Ashbury Company of the second part, and Messrs. Riche Brothers of the third part. It has reference mainly to the stipulation in the former contract with regard to the option to take the concession from Tournai to Douai, which it modifies to some extent, as to the period during which the option of the defendants' company to accept or decline the concession is to be exercised. The material parts of it, with reference to the questions in this case are, that it provides that the conventions of the contract of the 30th of January, 1865, as to the Antwerp and Tournai section of the line, are to be strictly maintained, except that the Ashbury Company are to appoint three instead of two commissioners of the société anonyme, as originally stipulated.

The contract Y was an additional or supplemental agreement to the contract B, modifying the quantities of work and the distribution of the cost of construction, in consequence of changes in the statutes of the société anonyme, required by the Belgian government.

The contract Z purports to be made between the Ashbury Company, represented by Sir Cusack Roney, on the one hand, and Messrs. Riche Brothers, on the other.

After reciting the contracts of the 30th of January, 1865, and that it had been agreed that the capital of the société anonyme for the Antwerp and Tournai Railway, which was to be 32,760,000 francs, should be represented by 55,000 bonds, at 3 per cent., on a capital of 500 francs, reckoned at 250 francs, and by 38,020 shares of 500 francs each, and a wish to modify the agreement between the Ashbury Company and Riche Brothers, it is substituted as a final settlement of the rights and liabilities of the Ashbury Company and Messrs. Riche.

After articles in substance binding the Ashbury Company to complete the société anonyme, and binding Messrs. Riche Brothers to carry out the construction of the line, in accordance

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with the conditions already settled between them and the proposed société anonyme, it is declared that Messrs. Riche Brothers have accepted the contract only after having secured to themselves and obtained the co-operation of the Ashbury Company, who have bound themselves to supply them with the funds necessary for the carrying out of their undertaking, and the Ashbury Company bind themselves to pay into the funds of the société anonyme an amount in cash of 15,316,000 francs, in exchange for the 55,000 bonds, taken at the rate of 250 francs each, part of the intended capital of the proposed société anonyme, and 3132 shares taken at par, such payments to be effected gradually in the proportion of the payments that were to be made to Riche Brothers, and in such a manner that the latter should always receive from the société anonyme an amount of 15,316 francs, in cash, upon a total certificate of 32,760 francs, and so on in the same ratio.

There are also provisions in the contract relating to the Douai section of the line in the event of the concession being claimed and accepted by the Ashbury Company, but it is not necessary to make any further reference to them.

I have thought it expedient to state thus fully the circumstances under which these contracts were entered into, as they are found by, or are to be inferred from, the facts stated in the special case, and the substance of such of their provisions as are important, because the manner in which the contracts are connected may have a material bearing upon the question how far, if not originally binding on the Ashbury Company, they have been rendered so by the subsequent conduct of the shareholders.

Engagements somewhat similar to those which were entered into with reference to the Belgian concession had also been entered into by the directors of the Ashbury Company in regard to a concession, in Spain, of a line of railway called the Madrid, Placentia, and Malpartida Railway, upon which large advances had been made by the directors out of the funds of the Ashbury Company. In neither case was there any ultimate contract binding the Ashbury Company to supply any fixed or rolling stock, and in the case of the Belgian contracts, the substance of the arrangements entered into was that the Ashbury Company were to supply the funds for the construction of the line.

The plaintiff having, as already mentioned, made the necessary plans and surveys for constructing the line of railway, proceeded, after the 14th of October, 1865, to construct the line, and entered into several contracts with other persons for that purpose.

In respect of this work, pay-sheets were sent to the société anonyme, approved and countersigned by Mr. McCandlish, as engineer, and the proper proportion of each pay-sheet was paid in cash into the treasury of the société anonyme by the directors of the Ashbury Company in the name of the company.

In October, 1865, the board appear to have been advised that the agreements were ultra vires of the directors, and not binding on the company, and that the 26,000*l.* could not be recovered back; and thereupon a scheme for the transfer of the concession was revived by the directors, and a company was projected for the purpose of taking over the contracts, to be called the Antwerp, Tournai, and Douai Railway Contract Company, Limited.

The first information with reference to these Belgian contracts which appears to have been given to the shareholders generally of the Ashbury Company was at the third annual general meeting of the company on the 5th of December, 1865.

That meeting was convened by a circular of the 27th of November, 1865, in which the business to be transacted was stated to be, *inter alia*, "to declare a dividend payable out of the balance as shewn by the balance sheet sent therewith."

The balance sheet referred to was made up to the 30th of September, 1865, and on the credit side were the following items:—

"Advances on contracts:—

"Madrid, Placentia, and Malpartida Railway £41,338 11 10

"Anvers, Douai, and Tournai Railway . . 27,191 14 8"

At this meeting it appears that these Belgian and Spanish contracts were the subject of strong observations, and that the chairman gave the meeting to understand that the item in respect of the Belgian contract would not appear again in the accounts, it being then considered that it would be taken over by the Antwerp, &c., Contract Company. (1)

(1) This appeared from the report of the committee of investigation referred to below, which was printed in the appendix to the special case.

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A resolution was passed at this meeting in these terms, viz. "That the accounts now read be approved and adopted," and a dividend for the year was declared out of the balance.

On the 20th of December, 1866, an extraordinary general meeting of the Ashbury Company was held, at which a committee of shareholders was appointed "to inquire into the past proceedings and present position of the company, and the best means of conducting its business for the future, with power to take such legal advice as they might deem desirable, and report to an early meeting of the shareholders."

The committee proceeded with the inquiry referred to them, and prepared a report; and, at an extraordinary meeting of the shareholders, held on the 1st of May, 1867, the report was read, and ordered to be entered on the minutes of the company. The report gives the history of the Belgian contracts, and the various steps taken by the directors in regard to them, together with observations on the advances in respect of the enterprise appearing in the balance-sheet of the 30th of September, 1865; and states, in substance, that the committee had been advised that the contracts were ultra vires, and that the shareholders were not bound by anything that had subsequently passed, but that the directors were liable to replace the moneys of the company which had been misapplied on the impeached transactions. The report, however, in conclusion, recommends an endeavour to effect an amicable settlement with the directors, without having recourse to legal proceedings. Three of the shareholders were thereupon deputed by the meeting to confer with the directors, with the view of an agreement being arrived at on the matters in dispute.

On the 14th of May, 1867, the fifth annual meeting of the company was held. This meeting was convened by a circular to the shareholders stating, among other objects of the meeting, as follows: that it was convened "to receive, consider, and if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting of the company held on the 1st of May, instant, to confer with the directors with the view to an agreement being arrived at on matters in dispute."

At this meeting a balance sheet was presented, made up to the

30th of September, 1866, shewing, on the credit side, advances on the Spanish and Belgian contracts in precisely the same form as that appearing on the balance-sheet of the previous year. Mr. Hulse, one of the deputation appointed to confer with the directors with respect to these items, reported the result of a conference with the directors, and it was resolved that the following recommendation of the deputation be received and adopted, viz.:—

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“That, having reference to the proceedings at the annual meeting of shareholders in the year 1865, in regard to the intention of the directors and other parties taking over the Antwerp, Tournai, and Douai Railway concession contract, and having reference also to the anticipated loss on the said contract, and also on the amount advanced by the Ashbury Company on the Madrid, Placentia, and Malpartida Railway concession contract, and the differences that have arisen in regard to the legality of these items of expenditure appearing in the Ashbury Company’s accounts, it is for the interests of the company that the following arrangement should be accepted, and that the same be accepted accordingly, and that it be referred to the solicitor of the company to carry it out in such way as counsel shall advise.

“1st. Messrs. James Ashbury, B. Whitworth, M.P., F. A. Finney, Alfred Peek, James Holden, Thomas Hodson, Jno. Whitehead, jun., W. A. Cunningham, Thos. Vickers, the executor of John Ashbury and Geo. Wood, by themselves or their nominees, hereinafter called the purchasers, to purchase from the Ashbury Company for the sum of £       , to be paid by four equal half-yearly instalments secured by promissory notes, without interest, any estate or interest which the company may have in the Antwerp, Tournai, and Douai concession contract, and the Madrid, Placentia, and Malpartida concession contract, on which the company may have paid sums amounting together to the sum of £     . All interest due by the Spanish Government on the Malpartida contract advance to belong to the Ashbury Company to this date.

“2nd. The Ashbury Company to take any legal proceedings in enforcing the claims, or defending any actions, or otherwise in relation to the said businesses, which may be required in the name of the Ashbury Company, but at the expense of the said pur-

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chasers, who are to indemnify the Ashbury Company against all claims and liabilities which have arisen, or may hereafter arise, in connection with the said concession contracts, or either of them, or which may be incurred in using the name of the company."

Subject to this resolution, the balance sheet and accounts for the year ending the 30th of September, 1866, were approved and adopted, an alteration being made in the balance sheet by omitting the amount of the advance on the Spanish contract, and changing the entry as to the advance on the Antwerp and Tournai contract into the following form, viz.—

"Advance on contracts, viz.:—  
"Madrid, Placentia, and Malpartida Railway,  
and Anvers, Douai, and Tournai Railway,  
taken as per resolution of shareholders, May  
14th, 1867 . . . . . £27,705 0 3."

It was resolved also that the shareholders who formed the deputation should superintend the completion of the proposed agreement.

On the 24th of December, 1867, the sixth annual meeting of the company was held.

This meeting was convened by a circular to the shareholders stating that, among other things, the meeting was held to transact the following business, viz. "to consider and, if so determined, to sanction a certain contract which has been entered into by the company with the directors thereof, in pursuance of a resolution passed at the last annual meeting of the company, held on the 14th of May, 1867."

At this meeting it seems tolerably clear that all the shareholders did not attend, but it must be presumed that the circular was sent to all. The deputation reported the terms of the agreement entered into with the directors, which was in the form of an indenture purporting to be made between the Ashbury Company of the first part, and certain directors and shareholders of the company, therein described as the purchasers, of the second part. (1)

(1) By this deed, after reciting that the company had been engaged in negotiations and transactions connected with the Belgian and Spanish railways in question and with the Antwerp, &c., Contract Company, in the course of

The resolution of the 14th of May, 1867, for the settlement of the differences between the directors and the company was sanctioned and confirmed, and it was resolved that the agreement reported, which had been entered into in pursuance of that resolu-

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which the company had made large advances, which appeared in the accounts submitted to the general meeting of the company as amounting in 1865 to 68,530*l.* 6*s.* 6*d.*, but which had been reduced in 1866 to 62,380*l.* 6*s.* 2*d.*; and that the company had been advised that all negotiations and transactions on its behalf or on its account with respect to the said railways were *ultra vires*, and that the company was not bound thereby, and that the company in fact disclaimed all liability and obligation in respect thereto, and had required the parties of the second part (being or representing the directors of the company who entered into such negotiations and transactions on the part of the company) to take upon themselves all the contracts and liabilities arising out of, or connected with, or consequent upon such negotiations and transactions, and to indemnify the company therefrom as thereafter provided; and that with a view to the future satisfactory working of the affairs of the company certain proposals, having for their object a settlement of all disputes and differences in relation to or arising out of the matter aforesaid, were made to a special meeting of the company, held on the 14th of May, 1867 (reciting the proposals and their adoption, and that it was referred to the solicitor of the company to carry them out in such way as counsel should advise); and that since the date of the meeting certain arrangements had been made between the company and the purchasers, under which 13,938*l.* 13*s.* 1½*d.* had been paid by the purchasers to the company in discharge and settlement

of one-half of the sum of 27,705*l.* 0*s.* 3*d.*, and of all claims for interest which either of the parties had upon the others in respect of the several monetary transactions arising out of the matters thereinbefore mentioned up to the 30th of September, 1867.

It was witnessed that in pursuance of the resolution and arrangements, and in consideration of the agreement thereafter entered into and the promissory notes to be given by the purchasers, the company agreed with the purchasers as follows:—

1. That the company would, at the request and expense of the parties requiring the same, make, do, and execute all such assignments, acts, matters, and things, as the purchasers respectively, or their counsel, might reasonably require and advise, for assigning to and vesting in the purchasers and their respective executors and administrators, in proportion to the amounts to be paid by them respectively upon the said promissory notes, all the rights, claims, estates, interest, and benefit of every description which the company had, or were supposed to have, upon or in respect of or in relation to the said Spanish and Belgian railways respectively, or the concessions thereof respectively, or the fixed or rolling plant thereof respectively, and the deposits, caution-moneys and other sums, and interest or dividends made, or paid, or accrued, or thereafter to accrue, in relation thereto or connected therewith, and all contracts and securities for the same, and the benefit of all sub-contracts which had been made, or expressed to be made, in connection



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tion, should be adopted and confirmed, and that the seal of the company should be affixed thereto.

The balance sheet made up to the 30th of September, 1867, was also adopted with this modification, that the entry which stood previously "Advances on contracts, 25,783*l.* 7*s.* 4*d.*" was directed to stand thus on the credit side of the account—"Advances to be refunded, in accordance with a resolution passed at a meeting of shareholders on the 14th of May, 1867, 27,705*l.* 0*s.* 3*d.*" The seal of the company was accordingly affixed to the indenture, which was also duly executed by the other parties to it.

Under these circumstances, it was contended before us on behalf of the defendants, first, that the contracts with the plaintiff were *ultra vires* of the directors of the Ashbury Company; secondly, that they were incapable of ratification by the shareholders so as to render them binding on the company in its corporate character; thirdly, that, if not incapable of ratification, they were not, in fact, ratified and rendered binding.

As regards the first of these contentions, we intimated during

therewith, with governments, or companies, or individuals.

2. That the purchasers should be considered as having been let into possession of the purchased property on the 30th of September, 1866.

By the three following clauses the purchasers agreed, on the execution of the indenture by the company, to make and deliver to the company their respective promissory notes for the respective sums set opposite to their names in the schedule, and (in the same proportion) to indemnify and save harmless the company and their property and effects from and against all the obligations of every description which had been entered into or undertaken by the company or any of its directors or agents, in respect of and arising out of the contracts and premises agreed to be assigned, or upon the use of the company's name in pursuance of the following clause:—

6. That the company should, at the costs and risks of the purchasers, allow its name to be used as plaintiff or defendant, as the case might require, in or about any actions, suits, or other proceedings which might be commenced or prosecuted in relation to the premises.

7. That nothing therein contained should be construed, deemed, or taken to be an admission by the company that all or any of the negotiations and transactions thereinbefore mentioned were legally binding on the company, or to preclude the company from maintaining and alleging that such negotiations and transactions were *ultra vires*, if they should be advised so to do, in any proceedings at law or in equity which might be taken, commenced, or prosecuted against the company in respect of the said negotiations and transactions, or any of them.

the argument our opinion that the Belgian contracts were in excess of the powers of the directors, and beyond the scope of the memorandum of association: *Taylor v. Chichester and Midhurst Railway Co.* (1) I agree entirely with my Brother Bramwell in his observations on the language of the memorandum of association to the effect that the words "carry on the business of mechanical engineers and general contractors" cannot be held to authorize generally the making of any contract whatever. They must, having regard to the context, be restrained to contracts for the execution by the company, or their servants, or agents, of mechanical engineering works, or other like works, and cannot be extended to such contracts as those in question.

The history of the formation of the company, though perhaps not admissible for the purpose of construing the memorandum, shews that such contracts were never contemplated; for the business purchased, which had been carried on by Mr. John Ashbury at Openshaw and Ardwick, had never been extended to the construction of railways, or to agreements of a "financing" description.

As regards the second point, namely, that the contracts were incapable of ratification by the shareholders so as to render them binding on the company in its corporate character, it was argued on behalf of the defendants that the contracts in question were so entirely beyond the competency of the company, that if every shareholder had agreed to them, and the corporate seal had been affixed to them, they would nevertheless have been invalid; and this was said to result from the true construction and effect of the Companies Act, 1862, under which the company was constituted. In support of this proposition it was contended that the contracts in question being beyond the scope of the memorandum of association were impliedly forbidden by the provisions of the 4th, 8th, and 12th sections of the Act; that although within certain limits provision is, by the conjoint effect of ss. 12, 13, and 50, made for changes or modifications of the conditions contained in the memorandum of association in pursuance of a special resolution, yet that the power to change or modify the conditions of the memorandum is limited to the increase or the consolidation of the capital

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or its division into shares, or its conversion into paid-up shares or stock, or by s. 13 to a change, with the approval of the Board of Trade, of the name of the company; and that the 4th of the company's articles of association, therefore, in so far as it impliedly authorized an extension of the business of the company by a special resolution, was at variance with the express provisions and spirit of the Act and wholly nugatory; and that it was impossible by any such resolution to enlarge the corporate capacity of the company so as to embrace such contracts as those in question.

It was not denied that if the corporate capacity of the company could be extended by such a resolution, then that contracts, which would have been regular and binding if such a resolution had been passed, might be subsequently sanctioned and ratified by all the shareholders, if entered into by the directors without having previously obtained the requisite authority.

But on the ground that the corporate capacity of the company was incapable of such extension, it was sought to distinguish this case from those of *Spackman v. Evans* (1), *Evans v. Smallcombe* (2), and *Houldsworth v. Evans* (3), in all of which it was taken for granted that the contracts then in question might, though ultra vires of the directors, have been ratified with the assent of all the shareholders, the company in those cases having been established under a different Act, viz. the 7 & 8 Vict. c. 110, and the contracts impeached not having been either expressly or impliedly prohibited by the conditions on which the company was originally constituted.

Mr. Watkin Williams also, upon this point, adopted as part of his argument the following passage from Lindley on the Law of Partnership, vol. i. p. 262: "With respect to those acts which directors have no power to do at all, it must be borne in mind that corporations have no greater capacity than is conferred upon them by their constitution. They exist for certain purposes more or less well defined in the instrument incorporating them, but they exist for no other purposes, and a corporation created for one purpose cannot lawfully do anything which is foreign to the purpose for which alone it was created. If, therefore, it can be predicated of any contract

(1) Law Rep. 3 H. L. C. 171.

(2) Law Rep. 3 H. L. C. 249.

(3) Law Rep. 3 H. L. C. 263.

entered into by or on behalf of a body corporate that such contract is ultra vires, i.e. one into which the corporation, even with the assent of all its members, cannot legally enter, such contract must necessarily be invalid. . . . There is an important difference between incorporated and unincorporated companies, for whilst it is competent for all the shareholders of an unincorporated company to depart from the agreement entered into by each with the others, it is not competent for all the shareholders of a company incorporated by charter or statute to do anything contrary thereto; nor can a corporate body be estopped by deed or otherwise from shewing that it could have had no power to do that which it purports to have done." It was argued also that the case of the *Phosphate of Lime Co. v. Green* (1), in which it was held (the company having been constituted under the Companies Act, 1862) that arrangements made by the directors of a company which were expressly forbidden by the articles of association, and therefore ultra vires, might be rendered binding by the subsequent assent and acquiescence of all the shareholders, was distinguishable from the present one; on the ground that what was there done was merely in contravention of the articles of association, but not inconsistent with the conditions of the memorandum, there being power under s. 50 of the Companies Act, 1862, to alter the articles, to an extent not permitted as to the memorandum, by means of a special resolution; and that what was done therefore was within the competency of the company, though done irregularly.

On the other hand, it was contended on behalf of the plaintiff, that the memorandum of association and the articles must be read together, and that the statement in the former of the objects of the company must be qualified by article 4, giving power by means of a special resolution to extend the company's business to other objects and purposes than those described in the memorandum; and that, if thus construed, the contracts in question were within the competency of the company, and that at all events they were, upon the authority of *Spackman v. Evans* (2), and the other cases following it, capable of ratification with the assent of all the shareholders.

The point does not appear to have been taken by the defendants in the court below, nor does the attention of that court appear to

(1) Law Rep. 7 C. P. 43.

(2) Law Rep. 3 H. L. C. 171.

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have been directed to the express provisions of s. 12 of the Companies Act, 1862, prohibiting, with the exceptions already mentioned, any alteration in the conditions of the memorandum of association, or to the difference between the provisions of the Companies Act, 1862, and those of 7 & 8 Vict. c. 110, which contains no express prohibition of an alteration after registration of the business or objects of the company; and it was assumed by Channell, B., and indeed by all the learned barons, and regarded as material to the question of ratification, that under the 4th of the articles of association means were (as expressed by Channell, B.) "provided for formally extending the business of the company so as to include the contract with the plaintiff."

It appears to me, however, that the memorandum of association and the articles are, by the Companies Act, 1862, treated as distinct, and that the memorandum cannot be so qualified by the articles as to reserve powers to extend or change the business or objects of the company by means of a special resolution.

The subsequent Act of 30 & 31 Vict. c. 131, amending the Companies Act, 1862, extends by s. 8 the power to modify the conditions contained in the memorandum of association, so far as to render unlimited the liability of its directors or managers, or of the managing director; but the circumstance that, in extending the power of modifying the memorandum of association, such power is only given to a limited extent furnishes, to my mind, a strong argument that the legislature intended that the operations of the company and its capacity to contract in its corporate character should be unchangeably fixed and restrained by the terms of the memorandum, and that the articles, with the exceptions specified in ss. 12 and 13, are to be subject to or in entire consistency with the memorandum. If so, then, as the contracts in question are not such as were contemplated by the incorporation of the company, and are in excess of its statutory powers, they must be void, unless they are such as can be rendered valid by the assent of all the shareholders: see *Society of Practical Knowledge v. Abbott* (1); *Bagshaw v. Eastern Union Ry. Co.* (2); *Coleman v. Eastern Counties Ry. Co.* (3); *East Anglian Ry. Co. v. Eastern*

(1) 2 Beav. 559.

(2) 7 Hare, 114.

(3) 10 Beav. 1.

*Counties Ry. Co.* (1); *Mayor of Norwich v. Norfolk Ry. Co.* (2);  
*Taylor v. Chichester and Midhurst Ry. Co.* (3)

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Is there authority, then, that in such a case as the present the assent of all the shareholders can render the contracts valid as contracts of the corporation? The case of *Spackman v. Evans* (4) and the other cases following it in the House of Lords are relied on as authorities to that effect; but there are differences between the provisions of the Companies Act, 1862, and those of 7 & 8 Vict. c. 110, which may well justify the distinction contended for by the defendants between the case of companies constituted under that Act and of companies under the Act of 1862, and account for the view taken by the House of Lords as to the power of all the shareholders to ratify a contract ultra vires of the directors, and apparently beyond the scope of the incorporation; but, at all events, I think the fact that there are no such prohibitory words in 7 & 8 Vict. c. 110, as are to be found in s. 12 of the Companies Act, 1862, and that the effect of such prohibitory words therefore was never considered by the House of Lords, is of itself sufficient to show that the view taken in those cases is not necessarily binding in the present one.

The 7th section of 7 & 8 Vict. c. 110, requires that companies constituted under it should be formed by a deed setting forth among other things the business or purpose of the company, and by s. 25, on obtaining a certificate of complete registration, the shareholders are to be incorporated for the purposes of the trade or business for which the company was formed, according to the provisions of the Act and of the deed; but s. 7 also gives the power of registering a further or supplemental deed if not repugnant to the Act, for the purpose of supplying any omission or defect as regards the matters required to be set forth in the deed of settlement, and under such a supplementary deed such alterations in the mode of dealing with the forfeiture of shares might have been adopted as were the subject of the contracts made in the case of the Agriculturists' Cattle Insurance Company, out of which *Spackman v. Evans* (4) and the other cases which followed it arose. Upon this view, therefore, 7 & 8 Vict. c. 110 provided means for

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.

(2) 4 E. & B. 397.

(3) Law Rep. 2 Ex. 356.

(4) Law Rep. 3 H. L. C. 171.

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It is true that this distinction was not adverted to in those cases, but there was no occasion to institute any comparison between the two acts, or to put any construction on the Act of 1862. But in *Dent's Case, In re the Anglo-Moravian Hungarian Junction Railway Co.* (1), decided by Lord Chancellor Selborne since the argument in this case, it was held that, under the Companies Act, 1862, articles of association professing to confer authority to modify the memorandum beyond the limited extent allowed by the Act are void, and the necessity of a rigid adherence to the directions of the Act is insisted on. The Lord Chancellor says in giving judgment, "We must not forget the important change made by the Act which introduced limited liability. Before that Act, partners in a trading partnership could not prescribe a limit to their liability. In favour of the shareholders the legislature permitted a limit to be placed on the liability, but it prescribed the means by which alone this could be done, and those means must be exactly adhered to; and the Act expressly says that it must be done by the memorandum of association. "Then the 23rd section of the Act provides that any subscriber of the memorandum shall be deemed to have agreed to become a member of the company, and shall be entered as a member on the register; and the 38th section provides, that the members of the company shall be liable for no more than the unpaid portion of their shares. All these provisions have reference to the memorandum by which the shares are to be limited. In the present case, the memorandum mentions the limit of the shares; and the effect of a person subscribing the memorandum was to make him liable for 20l. on each share, and in some way or other he must pay it. That was laid down expressly in the case decided by Lord Justice Giffard, *In re Baglan Hall Colliery Co.* (2), who said that if there were in that respect a contradiction between the articles and the memorandum, the articles must give way. . . . Then the 12th section of the Act provides, that the conditions contained in the memorandum of association may be modified to a limited extent if the articles authorize it. But that could only be

(1) Law Rep. 8 Ch. Ap. 771.

(2) Law Rep. 5 Ch. Ap. 346.

done (I am speaking of the law as it stood at the time when the question in this case arose) by the increase of capital or the consolidation or division of stock; and then the clause goes on, ‘but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.’ It is quite certain that under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void.”

The privilege of contracting as a corporation and with a limited liability is conferred, only subject to the express directions and limitations of the Act, of which it seems to me to be the policy as well as the true construction, to ignore (so to speak) the existence of the corporation and the power of the shareholders, even when unanimous, to contract or act in its name for any purpose substantially beyond or in excess of its objects as defined by the memorandum of association; but if the business of a company as thus defined could be extended or altered by the consent of all the shareholders, notwithstanding the express prohibition of s. 12, there would be an easy means of acquiring exceptional privileges whilst completely evading the Act.

A company registered for one purpose would practically obtain powers to carry out in its corporate name and character, and with a limited liability on the part of the shareholders, objects entirely different, and might undertake business or contracts altogether at variance with its object as set forth in the registered memorandum, without any notice whatever to the public. The shareholders in such a company might of course change from day to day, and persons buying shares, or even entering into contracts on the faith of the registered memorandum, might find all the funds of the company already pledged for totally different objects. Of course the individual shareholders assenting would have no just ground of complaint, but the fact that their acts might thus operate to the prejudice of strangers subsequently acquiring shares, or contracting with them on the faith of the registered documents of the company, goes far to prove to me that though all join in a contract

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beyond the competency of the company, the contract cannot be regarded as a contract by the corporation, but must be dealt with as one binding the shareholders, if at all, merely as individuals and not in their corporate capacity.

I admit that at common law (as was resolved in the case of *Sutton's Hospital* (1)), when a corporation is duly created all other incidents are tacite annexed, such as ability to purchase and alien, to sue and be sued, and to use what seal they will; and that even a clause in their charter restraining them from aliening or demising but in a certain form, though an ordinance testifying the desire of the Crown, is to be deemed but a precept and not binding in law, so that a corporation thus constituted acquires rights of contracting as extensive as those of a natural person; but the question under consideration has reference to the creation of corporations by statute with a limited scope and objects, and to the true construction of the statute law in regard to such bodies, a question which depends necessarily to a great extent, where the legislative provisions are not unmistakeably clear and express the other way, on the general policy of such legislation.

No doubt, as observed by Lord Cranworth (*Shrewsbury and Birmingham Ry. Co. v. North Western Ry. Co.* (2)), when the legislature constitutes a corporation it gives to that body *primâ facie* an absolute right of contracting. But he goes on to say, "that this *primâ facie* right does not exist in any case where the contract is one which, from the nature and objects of the incorporation, the corporate body is expressly or impliedly prohibited from making."

Adopting this view, what can rebut more strongly the presumption of a *primâ facie* general authority to contract than an express provision that the scope and objects of the company, as originally declared by its memorandum of association, shall be unchangeable, and in effect, therefore, that its corporate capacity shall exist only within the limits and for the purposes thus defined?

This argument is rendered more cogent by the consideration that the registered memorandum is notice to the public of the purposes for which alone the corporation exists, and of the scope of its powers; and that, in the case of a registered company, those who contract with it must be taken to have read its registered

(1) 10 Co. 30 b.

(2) 6 H. L. C. at p. 135; 26 L. J. (Ch.) at p. 493.

documents, and to be aware of any restrictions imposed by them on its capacity to contract: *Royal British Bank v. Turquand*. (1)

As to contracts substantially beyond its scope and objects, I prefer to regard the case as one of incapacity to contract, rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts. If, then, I am correct in this view, how can the individual assents of all the shareholders be sufficient to affirm or give validity to a contract which is beyond the scope and objects of the memorandum, so as to render it a contract of the ideal legal body, which exists only as a corporation, and with powers and capacity which are thus admittedly exceeded?

I am unable to agree with my late Brother Channell, that it is settled by the more recent authorities that shareholders in a company registered under the Act of 1862 may bind themselves in their corporate capacity by their individual assents to contracts not authorized by the memorandum of association. I cannot regard the cases of *Spackman v. Evans* (2), *Evans v. Smallcombe* (3), and *Houldsworth v. Evans* (4), as authorities to that effect; and I know of none others which can be so regarded. They may well do so with respect to any matter as to which they would have power under the Act (if it were done formally) to make an alteration in the memorandum or in the articles of association, but not otherwise; and I think that the distinction suggested on this ground by the counsel for the defendants between this case and that of the *Phosphate of Lime Co. v. Green* (5) is a sound one. In that case an alteration, which it was competent to them to have made, in the articles of association would have enabled the company to have done in a formal manner what was done informally by the assent of all the shareholders. But as the contracts in question here are to my mind clearly and entirely beyond the scope of the memorandum or of any alteration that could be made in it, and therefore beyond the scope of the incorporation, I have arrived at the conclusion that they are incapable of ratification so as to bind the body corporate.

But even if capable of ratification, have they been in fact rati-

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(1) 6 E. & B. 327.

(3) Law Rep. 3 H. L. C. 249.

(2) Law Rep. 3 H. L. C. 17.

(4) Law Rep. 3 H. L. C. 263.

(5) Law Rep. 7 C. P. 43.

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fied by the assent, express or implied, of all the shareholders? Though there were differences of opinion as to the facts and their effect in the three decisions in the House of Lords—*Spackman v. Evans* (1), *Evans v. Smallcombe* (2), and *Houldsworth v. Evans* (3), it was assumed in all that in order to the ratification of a contract ultra vires there must be the assent, express or implied, of every shareholder. It must be taken also, as stated by Willes, J., in *Phosphate of Lime Company v. Green* (4), that the ratification to be binding must be either with full knowledge of the character of the act to be adopted, or with an intention to adopt it at all events.

In dealing with this question I think we should be guided also by the considerations mentioned by Lord Cranworth in the case of *Houldsworth v. Evans* (5), and referred to by my Brother Bramwell in his judgment, viz. “that in these joint-stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, except in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do.” It seems to me equally reasonable that absent shareholders should not be bound to assume that those who attend a meeting will ratify acts of the directors in excess of their powers, unless they have express notice that the shareholders will be invited to do so.

But, applying these rules to the facts of this case, how does the matter stand? As far as appears, the first information to the shareholders, as already mentioned, that any portion of the company's funds had been advanced or applied towards contracts in connection with the Belgian railway was in the balance sheet of the 5th of September, 1865, which was circulated with the letter of the secretary of the 27th of November, 1865, convening the meeting of the 5th of December, and announcing that the meeting would be required to declare a dividend out of the balance shewn by the balance sheet. But the form in which these advances are

(1) Law Rep. 3 H. L. C. 171.

(3) Law Rep. 3 H. L. C. 263.

(2) Law Rep. 3 H. L. C. 249.

(4) Law Rep. 7 C. P. 43.

(5) Law Rep. 3 H. L. C. at p. 276.

entered in this and subsequent balance sheets until the meeting at which an arrangement was made with the directors, is quite consistent with advances having been made on contracts *intra vires*; and I am of opinion that it conveyed no sufficient information to the shareholders that anything had been done by the directors in excess of their power. From the strong observations made at the meeting of the 5th of December, it must be presumed that the facts as to the Belgian contracts were at all events to some extent made known to the shareholders present; yet, comparing the list and numbers of shareholders present with those who attended subsequent meetings, I have no hesitation in arriving at the conclusion that all were not present, and that whatever the effect of the approval and adoption of the accounts by that meeting (though I do not think it had any greater effect than that attributed to it by my Brother Bramwell in his judgment), it did not amount to a ratification of the Belgian contracts by all the shareholders.

As regards the subsequent meeting, after a careful consideration of the evidence in the appendix, and giving full effect to the circulars by which the meetings were convened and to the form in which the accounts were presented, I find nothing up to the meeting of the 1st of May, 1867, which conveyed to the shareholders any full or accurate information as to what had been done by the directors. The report of the committee of investigation presented at that meeting, did so, no doubt, to all who attended; and I think the subsequent circular of the 6th of May, 1867, convening the meeting on the 14th, was calculated to put the shareholders on inquiry, which, if made, would have put them in possession of all the facts up to that time. They would have become acquainted with the fact that the Belgian contracts had been entered into by the directors in the name of the company, and that on the ground that they were *ultra vires* the directors were considered liable to repay to the company the amount which had been advanced out of the company's funds, and that the committee of inquiry had recommended an endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings, but nothing more.

But if with such knowledge, or means of knowledge, any shareholder omitted to attend the meeting of the 14th of May, 1867,

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or to protest against any agreement with the directors short of their doing exactly what they might have been compelled to do by means of hostile proceedings in a Court of equity, can it be said that he intended to sanction whatever might be done at the meeting at all events, or to constitute the other shareholders his agents to make the arrangement which was adopted at that meeting, and afterwards carried out by the deed. If he did, I think the adoption of the concession would amount also to an adoption of the contracts with the plaintiff, for I agree that the two were inseparably connected, the directors having accepted the transfer subject to the contract with the plaintiff. But I cannot see on what principle he can be held to have done so, or that he was bound to take any step before this action was brought to signify his dissent. The case unfortunately does not state whether all the shareholders were present at the meeting of the 14th of May, 1867; and although a comparison of names and numbers in the case of other meetings leads to a conclusion that all were not present at some, at least, of those meetings, it is impossible by any such means to arrive at any conclusion either way as to the meeting in question. (1) But the burden is on the plaintiff to make out the ratification, which would not on any principle be complete without the assent of all the shareholders, and in the absence of proof that all the shareholders were present and assenting, the ratification is not established. As regards the subsequent meeting of the 24th of December, 1867, I infer that there were shareholders who did not attend; and as the substance of the arrangement subsequently embodied in the deed was adopted by those present at the annual general meeting of the 14th of May, and was (so to speak) a fait accompli, I cannot understand on what principle any shareholders who were not then present, and were not bound by that arrangement, should lose their right to dispute it by failing to attend and express their dissent on the 24th of December. If the attendance

(1) There was no statement of the number of shareholders in the company. The numbers present at the various meetings (exclusive of directors) were as follows: on the 5th of December, 1865, twenty-five; on the 20th of December, 1866, thirty-six; on the 1st of

May, 1867, thirty-six; on the 14th of May, 1867, forty; on the 24th of December, 1867, twenty; but some names which appeared at other meetings did not appear on the minutes of the 14th of May, 1867.

and assent of all had been proved I should feel, no doubt, that the arrangement embodied in the deed was an adoption of the concession, and, as a consequence, of the contract with the plaintiff, for I concur in the view expressed by my late Brother Channell in his judgment, that the deed which confers on the directors a right to transfer the contracts presupposes an election to take them, and not to treat them as void; and I think those parts of the deed by which the purchasers undertake to indemnify the company, and which declare that the deed is not to be taken as precluding the company from maintaining and alleging, if so advised, that the contracts were ultra vires, make no difference in this respect. They would have their effect as between the company and the purchasers, but they cannot, in my opinion, qualify the operation of the deed as a ratification so far as the plaintiff is concerned.

If, therefore, it had been competent to the shareholders to have ratified, and all had assented to the arrangement made on the 14th of May, 1867, the plaintiff would, in my opinion, have been entitled to recover. But as I think there is no proof of such assent by all the shareholders, and still more on the ground that the contracts under the circumstances were wholly incapable of ratification, I am of opinion that the question submitted in the case must be answered in the negative, and that the judgment of the Court of Exchequer should be reversed.

*Judgment affirmed.*

Attorney for plaintiff: *Wilkinson.*

Attorney for defendants: *Skynner.*

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June 11.

## SKINNER v. THE GREAT NORTHERN RAILWAY COMPANY.

*Discovery—Inspection—Privileged Documents—Reports by medical Men.*

Where an accident occurs on a railway, and the officials of the company in the course of their ordinary duty make a report to the company, whether before or after action brought, the report is not privileged. But when a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, the report made to them is privileged.

*Cossey v. London, Brighton, & South Coast Ry. Co.* (Law Rep. 5 C. P. 146) followed.

RULE to vary an order for inspection, made at chambers by Keating, J., in an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the defendants' negligence, whilst he was travelling as a passenger on their line.

The documents of which inspection was ordered comprised, amongst others, two reports, dated respectively the 15th of December, 1873, and the 4th of February, 1874, made to the defendants by Mr. Jackson, their medical officer, after examining the plaintiff. The examinations to which the reports referred were held, and the reports were made, before any action had been commenced or any communication made by the plaintiff's attorney, but after a claim for compensation had been made by the plaintiff and in consequence of that claim. The rule was to vary the order by excluding these reports.

On moving the rule, *F. M. White* referred to a case of *Malden v. Great Northern Ry. Co.* (1)

*Pritchard* shewed cause. The decisions in the Courts of Queen's Bench and the Common Pleas, with respect to this class of documents, are not altogether consistent; in this Court there is no reported decision.

[BRAMWELL, B. The distinction is this; where an accident happens, and the officials of the company in the course of their ordinary duty, whether before or after action brought, make a

(1) Note, post, p. 300.

report to the company that report is subject to inspection; but where a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, inspection of that report is not granted; that practice has been constantly followed in this Court.]

In *Fenner v. London & South Eastern Ry. Co.* (1), which was a considered judgment, and is the latest case on the subject, a wider rule was adopted, and it was laid down that a document of this nature is not privileged unless it is in the nature of instructions for the brief, which the judge will ascertain by examination of the document itself. That rule was acted upon in the present case by Keating, J., who perused the reports before he made the order for their inspection. That rule is not inconsistent with *Woolley v. North London Ry. Co.* (2) It must be admitted that the rule acted on in the later case of *Cossey v. London, Brighton and South Coast Ry. Co.* (3) would exclude these reports; but *Fenner v. London & South Eastern Ry. Co.* (1) is later than both these cases, and was decided after a full consideration and review of them and of numerous other authorities.

*F. M. White* was not called on to support the rule.

BRAMWELL, B. We have to choose between the decision of the Queen's Bench and that of the Common Pleas, and we follow the latter, which is in conformity with the practice of this Court. The rule must be made absolute.

PIGOTT, B. The case of *Cossey v. London, Brighton and South Coast Ry. Co.* (3) lays down a clear, broad, and intelligible principle, which there is no difficulty in acting upon; but if that is departed from, and the matter is made to turn upon the discretion of the judge, there can be no certainty in the practice.

CLEASBY and AMPHLETT, B.B., concurred.

*Rule absolute.*

Attorney for plaintiff: *Gammon.*

Attorneys for defendants: *Johnston, Farquhar, & Leech.*

(1) Law Rep. 7 Q. B. 767.

(2) Law Rep. 4 C. P. 602.

(3) Law Rep. 5 C. P. 146.



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Jan. 29, 30.

## MALDEN v. THE GREAT NORTHERN RAILWAY COMPANY.

RULE to vary an order for inspection of documents made by Martin, B., in an action to recover damages for personal injuries sustained by the plaintiff in an accident on the defendants' line, which happened on the 10th of October, 1871.

The plaintiff was attended by a Mr. Stevens. At his suggestion Mr. Jackson, the medical officer of the company, was called in; he met Mr. Stevens in consultation on the 30th of October, the 15th of November, and the 5th of December, and on the 20th of November and the 5th of December reports were made to the company by Mr. Jackson.

At the request of the company Mr. Erichsen examined the plaintiff in conjunction with Mr. Stevens and Mr. Jackson on the 3rd of January, 1872; on the 5th of January a short report of the examination was sent to the company signed by all three; and, on the 6th of January, a further and more detailed report was made to the company by Mr. Erichsen alone.

At this time no claim had been formally made on the company, nor had they had any communication with the plaintiff's attorney, whose first letter to the company, complaining of the consultation of the 3rd of January having been held without communication with him, was written on the 4th of January; but it was admitted that it was understood the company were responsible to the plaintiff.

On the 10th of April, 1872, another consultation was held between Messrs. Stevens, Jackson, and Erichsen, of which a report was on the same day sent to the company by Mr. Jackson.

The writ was issued on the 11th of December, 1872; the defendants paid 40s. into Court.

An order had been made at chambers by Martin, B., for the production of documents, including amongst others the above-mentioned reports, and several letters which passed between the defendants' attorney and Messrs. Jackson and Erichsen subsequently to the issuing of the writ on the 11th of December, 1872.

A rule having been obtained by *Sir J. B. Karlake, Q.C.*, to vary the order by omitting these documents,

*Murphy, Q.C.*, shewed cause, and relied on *Fenner v. London & South Eastern Ry. Co.* (1)

[In reference to the letters between the defendants' attorneys and Messrs. Jackson and Erichsen,

BLACKBURN, J., said. If it appears that there is a letter from the attorney in a cause to a man who may very probably be called as a witness at the trial, that letter being written after the litigation had commenced (which is the case with all these letters), is it not *prima facie* a privileged communication unless you shew some reason to the contrary?

*Murphy, Q.C.*, abandoned all documents written after the claim was actually made.]

*F. M. White* supported the rule and, as to the reports, relied on *Cossey v. London, Brighton and South Coast Ry. Co.* (1)

[QUAIN, J. Confidential communications are not necessarily privileged; but if they are made, not only as confidential communications, but with the view to or in the contemplation of a litigation they are privileged.]

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In giving judgment,—

BLACKBURN, J., said. We adhere to the principles we laid down in the case of *Fenner v. London & South Eastern Ry. Co.* (2); the difficulty is in the application of those principles. Letters written by gentlemen who may be called as witnesses to the defendants' attorneys, and letters from the defendants' attorneys to them are not necessarily privileged; but *prima facie* they are, and no case has been made here that would entitle us to order their production.

Then there is a report of a consultation that was held when the three medical gentlemen, Mr. Jackson, Mr. Stevens, and Mr. Erichsen, met and saw the patient. Mr. Stevens who certainly was, or ought to have been, according to the facts as they appear to us, purely the physician or surgeon of the patient, the plaintiff; Mr. Jackson, who was in that double situation that he was the surgeon of the patient endeavouring to cure him, but at the same time employed by the railway company, and who could, without any breach of faith, give the company any information; and Mr. Erichsen, who, as far as he was concerned, appears to have been told that he was going down there for the company in order to make a report to them as to the state of the patient for their information and guidance. No information was given beforehand to the plaintiff's attorney, nor, as it appears, to the patient's friends, that the meeting was going to be held. Nothing seems to have been said to him, and, so far as I see from the facts, he appears to have supposed that Mr. Erichsen was coming there, as Mr. Jackson did, to advise upon his treatment, and to see what was the best that could be done.

Now we are agreed upon this; that if a medical man is sent down to examine a patient and to report to a company, and it is done with such a warning to the patient's friends who are acting for him in the matter, or to his attorney if he has one—if it is done under such circumstances that there is a contract actually made that the doctors are to come and see the man, and have a fair examination and report to the company, and that report is to be for their guidance and is confidential, then undoubtedly we should not order them to produce it; and where the circumstances are such, from the plaintiff's attorney being concerned in it, that it may be implied, although not expressly said, that such an agreement was understood, I should say the same thing. The difficulty of implying an understanding is considerable, unless there is an attorney concerned in the matter, who would know what was the usual practice; and if the company choose to let it rest on an understanding and implication, they must run the risk of having litigation to see whether it is implied or understood. In the present case I should come to the conclusion that it was not. Mr. Stevens seems to have arranged the matter, he clearly not being an agent of the patient for any such purpose as that.

Then arises the question, is the thing in itself such a matter as would be

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privileged within the rule of *Fenner v. London & South Eastern Ry. Co.* (1)? And it happens that in this case there are two reports; one is dated the 5th of January, it is a short abstract of what the medical men do, which is sent to the company and signed by all three; that the plaintiff is clearly entitled to see, and it really conveys all that is material in the long letter to the company signed by Mr. Erichsen alone. That being so, there is no object in the longer report being pressed for, and it has been waived: we need not, therefore, decide whether it is privileged or not.

As to the other documents, the letters of the 20th of November, the 5th of December, and the 5th of January, it rests upon the defendants to establish affirmatively that they are privileged, and I think they have totally failed in doing so. Mr. Stevens and Mr. Jackson were not in any way witnesses; they were persons who were attending the patient as medical men, and they gave information to the company about his state, and the information which they gave the plaintiff is fairly entitled to see, and it comes within no ground of privilege.

QUAIN and ARCHIBALD, JJ., concurred.

A question subsequently arose as to the report of the 10th of April from Mr. Jackson to the defendants' attorneys, which was pressed for by the plaintiff; but the Court, after examining the document, held it to be privileged.

*Rule discharged as to the documents of the 20th of November, the 5th of December, and the 5th of January. Absolute as to the rest.*

Attorneys for plaintiff: *Hooper, Raynes, & Co.*

Attorneys for defendants: *Johnston, Farquhar, & Leech.*

June 25. ANDREWS v. THE MAYOR, ALDERMEN, AND BURGESSES OF RYDE.

*Corporation acting as Local Board—Local Government Act, 1858 (21 & 22 Vict. c. 98) s. 24—Seal.*

The defendants, a municipal corporation, having, by transfer from a body of commissioners, power to purchase certain gas works, and being also a local board, took proceedings for the purpose of purchasing the works and assessing the price by arbitration. In pursuance of a resolution passed at a meeting of a sub-committee appointed for the management of the business, the report of which was adopted by the council, the plaintiff was employed as a witness on the arbitration to support the evidence of the defendants' valuer. No appointment of the plaintiff under seal was made, but he acted as witness under the instructions of the valuer, who was so appointed.

In all these proceedings the defendants erroneously described themselves as

(1) Law Rep. 7 Q. B. 767.

"acting as the local board," and their seal as "the seal of the local board;" but it did not appear that the seal of the local board was any other than the municipal seal.

In an action brought by the plaintiff against the corporation for his services as witness :—

*Held*, that the municipal corporation and the local board could not be treated as independent bodies; that the plaintiff's contract was in substance with the corporation; and that he was entitled to recover.

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SPECIAL case stated in an action brought to recover a sum of 194*l.* claimed to be due from the defendants to the plaintiff for work and labour as a professional witness.

By the Ryde Improvement Act, 1854, a body of improvement commissioners was incorporated, with power to purchase the property of the Ryde Gas Company, which was a company registered under 7 & 8 Vict. c. 110.

On the 17th of October, 1859, the commissioners, by resolution, adopted the Local Government Act, 1858 (21 & 22 Vict. c. 98).

By the Ryde Gas Act, 1866, certain statutory powers were obtained by the company, the Act preserving the power of the commissioners to purchase the gas works, provided the power were acted upon within five years.

The defendants were incorporated by charter on the 23rd of July, 1868, and on the election in November of the mayor, aldermen, and councillors, they became, by virtue of 21 & 22 Vict. c. 98, s. 24, the local board.

On the 15th of December, 1868, the commissioners passed a resolution to transfer to the corporation, and the corporation passed a resolution to accept, and the commissioners executed (under 20 & 21 Vict. c. 50, s. 2) a deed poll under their common seal, transferring to the corporation all their "rights, powers, estates, property, and liability."

On the 14th of February, 1871, at a quarterly meeting of the town council "acting as the Ryde local board," it was resolved that notice should be given to the gas company to treat for the purchase of the gas works, and notice was given accordingly; and the company, in pursuance of this notice, gave to the defendants particulars of their interest and claim.

On the 24th of April, at a special meeting of the council "acting



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as the Ryde local board," it was resolved that the "seal of the board" be affixed to the appointment of Mr. Stevenson "as valuer on behalf of the corporation," and the seal was affixed accordingly; and it was further resolved that "the gas sub-committee appointed by the local board on the 19th inst. should be further entrusted with the management and conduct of the business necessary for the completion of the purchase of the Ryde gas works (except the appointment of solicitor and arbitrator), and to report thereon from time to time to the board."

At a special meeting of the council, "acting as the Ryde local board," held on the 16th of May, Messrs. Hearn and Fardell were appointed solicitors in the management of the purchase.

Mr. Stevenson proceeded to act under his appointment, but he desired that other witnesses should be employed to support his valuation; and the sub-committee, at a meeting held on the 16th of June, resolved that it be recommended to the board (amongst other things) that Mr. Cawley should be appointed arbitrator, and that certain persons, amongst others the plaintiff, should be selected as witnesses in support of Mr. Stevenson's valuation.

On the 20th of June at a meeting of the council acting as a "special meeting of the local board," the report of the sub-committee was presented, and was received and adopted; and it was resolved that "the seal of the local board be affixed to the appointment" of Mr. Cawley "as arbitrator on behalf of the local board," and to a notice to the gas company of such appointment, and the seal was affixed accordingly.

The gas company subsequently appointed their arbitrator, and the arbitrators appointed an umpire.

The plaintiff was, in accordance with the above-mentioned resolution, instructed by Mr. Stevenson, and attended and gave evidence on the arbitration, but no appointment under seal was made.

An award was subsequently made, the validity of which was disputed by the defendants, on the ground that it included property which they had not power to purchase.

May 4. *Cole, Q.C.* (*Michael* with him), for the plaintiff, after stating the case, was stopped by the Court.

*Manisty, Q.C.* (*Pinder* with him), for the defendants, contended that the defendants had in all their proceedings acted as the local board; the corporation, as such, had never contracted with the plaintiff, and could not therefore be sued; and, on the other hand, if the corporation were now sued by the plaintiff as the local board, he could not recover, because the local board had no power to purchase the gasworks or enter into the arbitration; the corporation only possessing this power by transfer from the commissioners.

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*Cole, Q.C.*, in reply, referred to *Nowell v. Mayor of Worcester*. (1)

*Cur. adv. vult.*

June 25. The judgment of the Court (Bramwell and Pollock, BB.) was delivered by

POLLOCK, B. [after stating the facts of the case, and observing that it was not stated in the case that the seal of the local board was any other than the corporate seal of the borough, and that it was, for the reasons afterwards given, to be assumed that it was the corporate seal, the learned judge proceeded:—] Under these circumstances it seems clear that the employment of the plaintiff was *de facto* by the corporation acting as the local board, and the only question is whether the corporation and the local board can for this purpose be treated as independent bodies, so as to enable the corporation successfully to contend that the plaintiff having been retained by and rendered services to the corporation acting as the local board, his remedy must be against the local board, or specifically against the corporation acting as local board.

There would be great force in this contention, if it could be shewn that the effect of the statute, by which alone the local board is created, was to establish a separate body. This, however, does not seem to be the case. The provision of the Local Government Act, 1858 (21 & 22 Vict. c. 98, s. 24) is as follows: "The duty of carrying into execution this Act shall be vested in a local board; and such local board shall be, 1. In corporate boroughs, the mayor, aldermen, and burgesses acting by the council." This does not create a new separate body, or provide for an independent seal or

(1) 9 Ex. 457; 23 L. J. (Ex.) 139.

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independent power of contracting, but in substance enacts that, in corporate boroughs, the corporation shall be the local board; and if so, then, whether, in contracting, the name and style of the corporation is used or that of the corporation acting as the local board, the essential body and contracting party is the corporation; or, to put the proposition in another form, the local board has no existence, and there could be no contract with them, unless by the local board is intended the corporation, who, according to the Act, are the local board.

Under the circumstances, we think that, though the local board was erroneously mentioned, the contract, in substance, was with the corporation, and, therefore, that they are properly made defendants in this action.

The case of *Nowell v. Mayor of Worcester* (1), to which we were referred by the plaintiff's counsel, is not a direct authority in support of this view, because there the corporation had contracted with the plaintiffs under the corporate seal, but the judgment of the Court, and especially that of the Lord Chief Baron, when he says "the statute, in forming this body into a local board of health, intended that they should contract as a municipal corporation," accords in principle with the view we now take.

The conclusion at which we had arrived renders it unnecessary to consider objections which were raised against the plaintiff upon the hypothesis that the cause of action and judgment ought to be looked upon as arising against and binding upon the local board, treating it as a body having an existence other than that of the corporation, and therefore we do not further refer to them.

For the reasons given, our judgment is for the plaintiff.

*Judgment for the plaintiff.*

Attorney for plaintiff: *Hacon*.

Attorneys for defendants: *Davies, Campbell, & Co.*

(1) 9 Ex. 457; 23 L. J. (EX.) 139.

## [IN THE EXCHEQUER CHAMBER.]

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June 12.

## KNOWLMAN v. BLUETT.

*Statute of Frauds, s. 4—Agreement not to be performed within a Year—Contract for Support of Illegitimate Children—Annuity—Executed Consideration.*

The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her 300*l.* per annum, by equal quarterly instalments, for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old. For several years the plaintiff maintained and educated the children, and the defendant paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The plaintiff continued to maintain and educate the children, and in May, 1873, brought an action for two and a half years' arrears:—

*Held*, affirming the judgment of the Court of Exchequer, that, the consideration being executed, she was entitled to recover as for "money paid at the defendant's request," at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within a year."

APPEAL by the defendant from a decision of the Court of Exchequer refusing a rule to enter a nonsuit. (1)

*Arthur Charles* (Cole, Q.C., and Lopes, Q.C., with him), for the defendant. The contract in this case was one not to be performed within a year. There should, therefore, have been a note or memorandum in writing of it under the Statute of Frauds, s. 4. †

[BLACKBURN, J. If this were an executory contract, then, as both parties appear to have contemplated its continuance beyond a year, the statute might apply; but here the plaintiff has actually maintained the children. Can you contend she is not to be paid for it?]

The consideration is executed, but the statute nevertheless applies: *Cocking v. Ward*. (2) Part performance by one party can only take the case out of the statute where all that is to be done by that party is to be done within the year: *Donellan v. Read*. (3)

[BLACKBURN, J. In *Souch v. Strawbridge* (4) Tindal, C.J., inti-

(1) Reported ante, p. 1.

(3) 3 B. &amp; Ad. 899.

(2) 1 C. B. 858; 15 L. J. (C.P.) 245.

(4) 2 C. B. 808; 15 L. J. (C.P.) 170.



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mates his opinion that the statute does not apply where the consideration is executed, and that case is subsequent to *Cocking v. Ward*. (1)]

Tindal, C.J., was a party to the considered judgment in *Cocking v. Ward*. (1) His dictum in *Souch v. Strawbridge* (2) was obiter.

[ARCHIBALD, J., referred to *Thomas v. Fredricks*. (3)]

There the agreement on which the plaintiff recovered was valid and there was nothing to prevent an action being brought upon it. (4) But s. 4 of the Statute of Frauds enacts that no action shall be brought unless there is a note in writing. If the plaintiff was entitled to recover as for "money paid," the amount should have been assessed by the jury.

[GROVE, J. The defendant did not ask that this should be done.]

No, because the plaintiff's case was rested, both in allegation and proof, upon the special contract.

[He also referred to the cases relied on in the Court below. (5)]

*Folkard* (*St. Aubyn* with him), for the plaintiff, was not called on.

BLACKBURN, J. We are of opinion that the Court of Exchequer was right in refusing a rule in this case. The bargain between the parties was that if the plaintiff would take care of and maintain the children, the defendant would pay her 300*l.* a year as long as she did so. This arrangement was never revoked, and the plaintiff having taken care of and maintained the children, now sues for arrears due to her. It is said that the action is not maintainable because there is no memorandum in writing of the bargain. But the plaintiff has performed her part of it, and it would be unjust if she could not obtain repayment of the sums she has expended. She could have maintained an action for "money paid at the defendant's request," and it would have been no answer to have said that the term in respect of which she was suing was longer than a year, and that the agreement which fixed the rate of

(1) 1 C. B. 858; 15 L. J. (C.P.) 245. (3) 10 Q. B. 775; 16 L. J. (Q.B.) 393.

(2) 2 C. B. 808; 15 L. J. (C.P.) 170. (4) Per Lord Denman, C.J., 10 Q. B. at p. 781.

(5) Ante, pp. 3, 4.

remuneration was one not to be performed within a year. We think that in substance her present claim is for money paid, although the declaration is in form upon a special contract.

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KEATING, MELLOR, LUSH, GROVE, and ARCHIBALD, JJ., concurred.

*Judgment affirmed.*

Attorneys for plaintiff: *Wedlake & Letts, for Edmonds & Son, Plymouth.*

Attorneys for defendant: *Le Riche & Son, for Carter, Torquay.*

MILL v. HAWKER AND OTHERS AND WICKETT.

*June 4.*

*Trespass—Highway Board—Surveyor—Individual Corporators—Personal Liability—5 & 6 Wm. 4, c. 50—25 & 26 Vict. c. 61.*

The members of a highway board upon an allegation that a path across the plaintiff's field was a public highway, by a resolution passed at a board meeting, directed their surveyor to remove an obstruction placed across it by the plaintiff. The following day they gave him an order in writing to the same effect. He removed the obstruction accordingly, and the plaintiff thereupon brought an action of trespass against the members of the board who had concurred in the resolution and the surveyor. There was no evidence that the path in question was a highway :—

*Held* (by Pigott and Cleasby, BB., Kelly, C.B., dissenting), that the action was maintainable.

By Pigott and Cleasby, BB. First, that the resolution was unlawful altogether, inasmuch as it was beyond the province of the highway board, as a corporate body, to determine whether the path was a highway or not, and to direct the removal of an obstruction, and that the members who concurred in the resolution were therefore personally liable.

Secondly, that the circumstance that the surveyor was by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board did not excuse him if in obeying their orders he did an unlawful act.

By Kelly, C.B. First, that the action should have been brought against the board, the resolution and order having been corporate acts and within the competence of the board to perform, as being charged with the duty of maintaining the highways of their district in repair.

Secondly, that the surveyor, being bound by statute to obey the orders of the board, was exempt from liability as being a mere ministerial officer.

DECLARATION. Trespass by taking locks off the plaintiff's gates.

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Plea: Not guilty by statute (5 & 6 Wm. 4, c. 50, s. 109; 25 & 26 Vict. c. 61, s. 9).

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Issue.

The cause was tried before Kelly, C.B., at the Cornwall summer assizes, 1873, when the following facts were proved:—

The plaintiff is the occupier of some land called Crapps Park, in the parish of Boscastle. Through this land there runs a path, across which the plaintiff, in August, 1872, placed gates, which he locked. On the 29th of August, at a meeting of the highway board for the Camelford district, within which the path is situated, a discussion took place as to whether it was a public way or not, and after hearing the statements of some witnesses and the attorney of the now plaintiff, the board resolved that it was a public way, and that “Mr. Mill, the tenant, and Miss Hellyar, the owner of the land through which it passes, be served with notice to remove the obstruction they have created, and if the same be not removed on or before six o’clock on the 31st instant, the district surveyor remove the same.” The notices were given and disregarded, and the surveyor thereupon removed the obstruction. The plaintiff afterwards relocked the gates, and on the 29th of November, at a board meeting, a resolution was passed directing the surveyor again to remove the locks. On the following day the surveyor, who had been present at the meeting, received a letter from the clerk of the board in these terms:—

“Camelford Highway District, 30th November, 1872.

“Dear Sir,—The highway board, at their meeting yesterday, ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Lesnewth, and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the said road.

“By order of the board.

Claud. C. Hawker, Clerk.

“Mr. Wickett, Surveyor.”

Mr. Wickett, on the 30th of November, in pursuance of the

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resolution passed at the meeting, removed the locks. The plaintiff then commenced this action against all the members of the board who had concurred in the resolution of the 29th of November, the clerk of the board, and Wickett, the surveyor. Notice of action was given to all the defendants. No evidence that the locus in quo was a highway was given.

On its appearing that the clerk, C. C. Hawker, had taken no part in the resolution, it was admitted that he was not liable. With regard to the other defendants it was objected, at the close of the plaintiff's case, first, that the members of the board who had concurred in the resolutions were not liable individually; and, secondly, that Wickett was not liable, because he committed the trespass complained of by an order of his employers, which he was by statute (25 & 26 Vict. c. 61, s. 16) bound to obey. (1)

The learned judge was of opinion that the objections were well founded, and directed a nonsuit accordingly.

In Michaelmas Term a rule was obtained to set aside the nonsuit and for a new trial, on the ground of misdirection in this,—that the learned judge ruled that the defendant members of the board and the surveyor were not individually liable.

Jan. 30; Feb. 7. *Kingdon, Q.C.*, and *Pinder* (with them *Lopes, Q.C.*), shewed cause. First, the members of the board are not personally liable. They acted as a corporation, both in passing the

(1) The 25 & 26 Vict. c. 61, constitutes a highway board a body corporate, and such board is (s. 11) to have all the powers, rights, duties, liabilities, capacities, and incapacities of the "surveyor" of highways under 5 & 6 Wm. c. 50, and is to be deemed "successor in office" to the surveyor (s. 43, subs. 3). No member of the board is to be made personally responsible for any "lawful act" done by him as such member (s. 9, subs. 6). By s. 17 it is enacted that the highway board of a district shall maintain in good repair the highways within that district, and that it shall be the duty of the surveyor to submit to the board

an estimate of the expenses likely to be incurred in each year for that purpose. By s. 12 the board has power to appoint a district and an assistant surveyor; and s. 16 enacts that "the district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties of this Act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties; and the assistant surveyor, if any, shall perform such duties as the board may require, under the direction of the district surveyor."



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resolution and in issuing the written order, and should have been sued in that capacity. The board could have been made liable in an action of trespass: *Maund v. Monmouthshire and Staffordshire Canal Co.* (1); *Smith v. Birmingham and Staffordshire Gaslight Co.* (2); *Eastern Counties Ry. Co. v. Broom* (3); *Yarborough v. Bank of England*. (4) The act which was done was not ultra vires. The board are charged with the duty of repairing the highways within their district (25 & 26 Vict. c. 61, s. 17), and for that purpose may order an obstruction to be removed. It is admitted that the defendant members acted bonâ fide. But individual corporators cannot be made personally responsible unless they acted maliciously: *Harman v. Tappenden* (5); or unless what they do is absolutely unconnected with any corporate purpose: *Attorney General v. Mayor of Liverpool* (6); *Attorney General v. Bailiffs of Retford*. (7)

Secondly, Wickett, the surveyor, is not liable. He is the mere ministerial officer of the board, and is bound by s. 16 of 25 & 26 Vict. c. 61, to obey their orders. His position is analogous to that of a process server of a court of justice, who is not responsible personally for a trespass committed by him in carrying out the orders of the court: *Dews v. Riley* (8); *Andrews v. Marriis*. (9) Again, the principle of *Buron v. Denman* (10) applies. The surveyor was the servant of a public body, acting for public purposes. He is not at liberty to inquire whether any order which they give is legal or not. It is enough if it is their order. Here he not only was aware of the terms of the resolution at the meeting, but was furnished with what appeared to be a valid order of his employers signed "by order of the board" by their clerk.

*Arthur Charles* (with him *H. T. Cole, Q.C.*), in support of the rule. The defendants, who are members of the board, cannot shield themselves by alleging that they committed this trespass in their corporate character, unless the act was one which was within the competence of the corporation, assuming the facts to be as they

(1) 2 Dowl. (N.S.) 113.

(2) 1 A. &amp; E. 526.

(3) 6 Ex. 314; 20 L. J. (Ex.) 196.

(4) 16 East, 6.

(5) 1 East, 555.

(6) 1 My. &amp; Cr. 171.

(7) 3 My. &amp; Cr. 484.

(8) 11 C. B. 434; 20 L. J. (C.P.) 264.

(9) 1 Q. B. 3.

(10) 2 Ex. 167.

supposed: Grant on Corporations, pp. 281, 547; *Taylor v. Dulwich Hospital* (1); *Attorney General v. Wilson* (2); *Rex v. Watson*. (3) If the act was one which the corporation could not, consistently with its constitution, have done, it was a mere pretended corporate act, for which those concurring in it are personally liable: *Sands v. Child*. (4) Now here, admitting that the locus in quo was a public path, the board would have had no authority, as a board, to direct the obstruction to be removed. They are the "successors in office" of the old "surveyor of highways" (25 & 26 Vict. c. 61, s. 43), and have the same powers as he had (s. 9, subs. 6). His powers are defined by 5 & 6 Wm. 4, c. 50, which moreover prescribes the mode of proceeding against any person who obstructs a highway. Without an order in writing from a justice (s. 73) he could not, as surveyor, remove an obstruction. If he did, he acted at his own peril, and had to justify himself as one of the public: *Keane v. Reynolds* (5); *Brook v. Jenney* (6); *Witham Navigation Co. v. Padley*. (7) The fact of his acting bonâ fide did not protect him. It only entitled him to notice of action: *Smith v. Hopper*. (8) The proper course therefore for the different members of the board to have pursued would have been to obtain an order for the removal of the obstruction, or to have summoned the plaintiff for wilfully obstructing the highway (under 5 & 6 Wm. 4, c. 50, s. 72), or to have preferred an indictment. Instead of adopting one of these courses they did an act ultra vires, for which the corporation as such could not have been sued: *Poulton v. London and South Western Ry. Co.* (9); *Green v. General Omnibus Co.* (10)

[KELLY, C.B. The highway board are bound, under 25 & 26 Vict. c. 61, s. 17, to see that all highways within their district are properly kept in repair. Suppose it had been reported to them that this way was out of repair, and they had directed Wickett to repair it, and for that purpose he had removed the obstruction by their orders, would it not have been within their competence to give such orders?]

(1) 1 P. Wms. 655.

(2) Cr. &amp; P. 1.

(3) 2 T. R. 199.

(4) 3 Lev. 351.

(5) 2 E. &amp; B. 748.

(6) 2 Q. B. 265.

(7) 4 B. &amp; Ad. 69.

(8) 9 Q. B. 1005; 16 L. J. (Q.B.) 93.

(9) Law Rep. 2 Q. B. 534.

(10) 7 C. B. (N.S.) 290; 29 L. J. (C.P.) 13.

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It would not. The duty of maintaining the highways cannot confer upon them any power to remove obstructions except in the manner prescribed by the Act. Nor was there any suggestion in the present case that the defendants acted with a view to subsequently directing the repair of the footway.

Secondly, the defendant Wickett is liable. He did the wrongful act, and 25 & 26 Vict. c. 61, does not relieve him from liability. It does no more than establish the relation of master and servant between the board and himself, leaving him otherwise within the general rule that a tortfeasor cannot excuse himself on the ground that he acted as the agent or servant of another: *Stephens v. Elwall*. (1) The maxim respondeat superior does not apply to discharge the servant, but to charge the principal. *Buron v. Denman* (2) was decided upon the ground that the act complained of was an act of the State. In *Dews v. Riley* (3) and *Andrews v. Marris* (4) the defendants acted under warrants of courts of competent jurisdiction as ministerial officers. Here Wickett acted upon an illegal resolution, and his position is not altered by the circumstance that he afterwards received a written order from the clerk of the board embodying that resolution.

*Cur. adv. vult.*

June 4. The Court differing in opinion, the following judgments were delivered:—

CLEASBY, B. The judgment I am about to read is that of my Brother Pigott and myself. There are two questions raised in this case. A trespass was committed upon the plaintiff by taking the locks off one of his gates, and the two questions are, first, whether the defendant Matthew Wickett is liable for the trespass; secondly, whether the other defendants (except Claudius Cregan Hawker) are liable. It was admitted that the defendant Claudius Cregan Hawker was not liable. The facts were that the plaintiff had caused a gate which crossed a footway on his property at Crapp's Park to be locked. It was alleged that this was a public footway, and the subject was brought forward at a meeting of the board of waywardens or highway board of the Camelford highway district,

(1) 4 M. & S. 259.

(2) 2 Ex. 167.

(3) 11 C. B. 434; 20 L. J. (C.P.) 264.

(4) 1 Q. B. 3.

held on or about the 29th of November, 1872. The defendant Hawker was clerk of the board, and all the other defendants except Wickett were members of it, present at the meeting. The defendant Wickett was the district surveyor of the board.

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It was sworn, in answer to the usual interrogatories administered by the plaintiff to the defendants, that all the defendants (except C. C. Hawker and Wickett) being present at the board meeting, directed, or concurred in directing, the defendant Wickett to remove the locks from the plaintiff's gate, and that the defendant Wickett did so on the day following the meeting by the directions of the board given at the meeting. Before the removal of the locks by Wickett he received from the clerk of the board the following letter:—

“Camelford Highway District,

“30th of November, 1872.

“Dear Sir,—The Highway Board, at their meeting yesterday, ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Lesnewth; and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the said road.

“By order of the board.

Claud. C. Hawker, Clerk.

“Mr. Wickett.”

At the trial it was objected, on behalf of the defendants, that the action should have been brought against the highway board, and that the defendants were not personally liable. The learned judge who tried the cause admitted the objection, and nonsuited the plaintiff.

For the purpose of the present inquiry, the trespass having been proved and no justification proved, it must be taken that the removal of the locks was unlawful; if the objection had not prevailed, as matters stood the plaintiff would have been entitled to a verdict. With regard to the first question, viz. the liability of Wickett, it appears to us that the general rule applies, and that a servant who does an act which is unlawful cannot justify it be-



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cause it was done by the order of his master or employer. This rule applies as much to the servants of those who act in a public as in a private capacity.

The mere fact of persons having a public office or employment (whether created by Act of Parliament or not) does not take them out of the operation of the law and give to their acts any greater force or efficacy, or to their servants any impunity. There is an apparent exception to this in the case of sheriffs or officers of courts of justice, who are excused if the judgment and process under which they acted are subsequently reversed, and the officers are still excused if they acted in the execution of the process. The defendants relied on this exception, and cases were referred to: see judgments in *Andrews v. Marriis* (1), and *Dews v. Riley*. (2) But there is no analogy between the case of the officer of a court of justice whose duty it is to give effect to the judgment of the Court which, though erroneous, cannot be called illegal if the Court have jurisdiction on the subject-matter, and a servant obeying the orders of his superior, whose orders may be legal or not, as the case may be.

It is, no doubt, a hardship that an act of obedience to the orders of a public body should involve a responsibility; but the risk is small of public bodies (which act generally under advice) doing illegal acts, and the hardship is no ground for setting aside so fundamental a rule as that the person who himself does an illegal act becomes by doing so responsible, and may be sued by the person injured without his looking any further.

There is nothing in the Act of Parliament under which the surveyor is appointed to exempt him from liability. The effect of the sections relating to the appointment of surveyor (ss. 12 and 16) is to establish the relation of principal and agent or master and servant between him and the highway board. The words of the 16th section, that he shall "in all respects conform to the orders of the board in the execution of his duties," cannot be read to mean that he shall be bound to obey the orders of the board whatever they are. Previous to this Act of Parliament, the surveyor had been authorized to act upon his own judgment, but this enactment makes it his duty to abide by the directions of the board as his

(1) 1 Q. B. 3.

(2) 11 C. B. 434; 20 L. J. (C.P.) 264.

superiors in all matters relating to the repair of the roads. It is hardly reasonable to read it as importing that he is relieved from responsibility for whatever he does, provided he acts by their orders. The object is to regulate his conduct, and not to limit his responsibility to third persons.

As regards the other defendants who came to the resolution in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued: see *Attorney General v. Mayor of Liverpool* (1); *Attorney General v. Bailiffs of Retford*. (2) There is, indeed, an express provision to this effect as regards the members of the highway board—but it is expressly limited to lawful acts of the board—in s. 9, subs. 6, of the Highway Act, 25 & 26 Vict. c. 61. And it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting ultra vires, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion. And in this case, unless the letter of the 30th November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the highway board given at the meeting, that is, of the 29th of November. The cases of *Taylor v. Dulwich Hospital* (3) and *Reg. v. Watson* (4), may, however, be referred to in support of the proposition that the individuals really do the act; and in the case of *Poulton v.*

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(1) 1 My. &amp; Cr. 171.

(2) 3 My. &amp; Cr. 484.

(3) 1 P. Wms. 655

(4) 2 T. R. 199.

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*London and South Western Ry. Co.*, and particularly in the judgment of Blackburn, J. (1), the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts. The highway board have authority to do what the surveyors would do under the previous act. They have all the powers, rights, duties, liabilities, capacities, and incapacities of the surveyor (s. 11), and are to be deemed successors to the surveyor, s. 43 (subs. 3). It might be sufficient to say that in the case of a disputed footway the order to remove an obstruction could only follow upon something like a judicial act of the surveyor in determining whether there was or was not a public footpath, and he has no authority whatever to act judicially in such a matter. But a reference to the sections of the previous Act, 5 & 6 Will. 4, c. 50, would shew that the surveyor had no such power of removal. Section 72 does not apply at all, and s. 73 only enables the surveyor to remove any obstruction after he has obtained the order of a justice. In like manner, the power of a surveyor to remove encroachments is founded upon a conviction under s. 69: *Keane v. Reynolds*. (2) In reality, the right of a person to take the law into his hands and use force to remove an obstruction is founded upon this, that he is at the time using the highway as he is entitled to do, and that as he cannot use it without removing the obstruction, he is justified in doing so. And the precedents in pleading put it on that ground. There is no right to remove the obstruction as a retaliation upon the person who has put it there.

But a corporate body who orders the removal, and so uses force in determining a legal right, is in a different position. They do not want to use the road, and have not the justification of necessity in the exercise of a legal right; they can only justify it on the ground that they have come to the determination that the obstruction is illegal and ought to be removed, and they are not authorized to enter upon such an inquiry or form such a con-

(1) Law Rep. 2 Q. B. at p. 538.

(2) 2 E. & B. 748.

clusion. It is the province of the justices to whom an application may be made to form such a conclusion.

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The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.

Sections 17 to 19 shew what the office of the highway board is, and that it is a corporation for a particular purpose, viz. to do what is necessary to keep the highways in repair, and the provisions in s. 18 as to certain costs resulting from applications to justices being regarded as costs of the board in repairing the highway, and paid accordingly, shew conclusively to our minds that the damages and costs of defending an action of trespass such as the present would not be costs of the board in any way chargeable upon the parishes forming the board, or either of them. It would appear to be only right, if such damages and costs were payable at all, that they should be paid by the parish in which the road is situate, like the expense of repairing the road. And yet the persons who ordered the trespass might be the persons representing the other parishes in the district, and not the parish wherein the road was situate. Just see what a strange state of things this would introduce. Sect. 20 provides that there shall be a district fund, and that the salaries of the officers of each parish, and all expenses incurred by the highway board for the common account and benefit of all the parishes in the district, shall be paid out of the district fund. This could not include these damages and costs, and they could not come out of the district fund. The section goes on to provide that the expense of keeping in repair the highways of each parish, and all other expenses in



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relation to such highways, shall be a separate charge on each parish. It would certainly seem strange if the highway board had the power, by a resolution, of throwing upon a particular parish such a charge as that of paying the damages and costs of an action like the present, and unless they could do so, there would be no fund out of which the damages and costs could be paid. When the parish denies the obligation to repair, s. 19 points out the course to be pursued.

It appears to us that it is not the province of the highway board to contest the question whether a particular way is a highway or not, as the members chose to do by the resolution set forth at the beginning of this case. For the above reasons we think that, as the plaintiff was nonsuited, there ought to be a new trial in this case.

KELLY, C.B. The highway board of the district of Camelford, in Cornwall, constituted and incorporated under s. 9 and other sections of 25 & 26 Vict. c. 61, upon the complaint of the churchwardens of the parish of Minster, that a highway in that parish and within the district had been obstructed by a locked gate thrown across it (as was alleged, contrary to the statute), at a corporate meeting, duly convened and held according to the Act, having investigated the matter of the complaint, came to the following resolution, which was then and there entered on the minutes:—"Resolved, that the board having heard the complaint and the defendant, Mr. Mill" (the plaintiff in this action), "and the witnesses, as well as Mr. White, the defendant's attorney, is of opinion that the road leading from Boscastle, by the Wellington Hotel to Crapp's Park, is a public road, and that therefore Mr. Mill, the tenant, and Miss Hellyar, the owner of the land through which it passes, be served with notices to remove the obstruction they have created, and if the same be not removed on or before six o'clock of the 31st instant, the district surveyor remove the same." These notices having been given and disregarded, the surveyor removed the obstruction. The plaintiff relocked the gates, and on the 29th of November another resolution was passed at a board meeting directing the surveyor again to remove the locks. This resolution was notified to Wickett, the district sur-

veyor, and an order of the board, signed by their clerk, forthwith to remove the obstruction, was duly served upon him ; and he proceeded, in obedience to the order, to remove the locks from the gates, which was the trespass complained of in this action.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character but, against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution ; and I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise or did exercise any personal authority or power. The resolution was the act of the corporation and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is ultra vires, and is not, and cannot be in contemplation of law, a corporate act at all.

In *Harman v. Tappenden* (1) the Free Fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected "That no action would lie to recover damages against individuals for acts done in their corporate capacity, and that non constat, but that all or some of the defendants might have voted against the order of amotion." When the case came before the Court upon a motion to enter a nonsuit and in arrest of judgment, the Court intimated very strong doubts on this ground how far the defendants were answerable in damages in their private character for

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(1) 1 East, 555.

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acts done by them in their corporate capacity. And Lord Kenyon, C.J., said that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington* (1), and *Rex v. Mayor of Rippon* (2), and added, "that he had many years ago moved for a mandamus to the master and fellows of Wadham College to compel them to put the college seal to a return which they were required to make, and to which Mr. Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences, but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." Lawrence, J., expressed the same doubt, and, finally, upon cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged: see also 1 Ventris, 351, and *Rex v. Windham* (3), the case alluded to by Lord Kenyon. It is true that where individuals make a pretended corporate act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *Rex v. Watson*. (4) But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member, who, like Mr. Windham in the *Wadham College Case*, may have been opposed to the act in respect of which the action may be brought. It was, indeed, once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyns' Digest, Franchises, F. (19.). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable. In *Yarborough v. Bank of England* (5), the plaintiff

(1) Carth. 171.

(2) 1 Ld. Raym. 563.

(3) 1 Cowp. 377.

(4) 2 T. R. 199.

(5) 16 East, 6.

recovered in trover for the unlawful detention by a clerk in the bank, under its authority, of a Bank of England note. Can it be contended that an action could have been maintained against one of the directors of the Bank of England, who might have been present at the resolution that the clerk be directed to detain the note? In *Smith v. Birmingham and Staffordshire Gas Light Co.* (1), trover was held maintainable against the company (a corporation) for the wrongful seizure of a quantity of furniture by a bailiff under their authority. And in *Maund v. Monmouthshire and Staffordshire Canal Co.* (2), the plaintiff recovered in trespass for the seizing and converting under the orders of the defendants certain barges and a quantity of coal. It was never suggested that in either of these cases the action should have been brought against the individuals who happened to be present when the act in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants execution might issue for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by ss. 20—27, and others.

It was argued that no' action could be maintained against the board on the ground that the resolution and the order to the surveyor were ultra vires. But I apprehend that this is a misapplication of the term ultra vires. If the board, by resolution or otherwise, had accepted a bill of exchange directing their clerk or

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(1) 1 A. &amp; E. 526.

(2) 2 Dowl. (N.S.) 113.



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other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been ultra vires, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act is to be deemed ultra vires, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law. Two cases have, however, been cited which seem to bear upon the question against the defendants. But the first, *Poulton v. London and South Western Ry. Co.* (1) merely shews that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand, in the Dulwich College case, *Taylor v. Dulwich Hospital* (2), the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was ultra vires and not binding on the corporate body, and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which, being ultra vires, was absolutely void.

The remaining question is whether Wickett, the surveyor, is liable to this action. The general rule, no doubt, is that one who does an unlawful act cannot justify himself by pleading the authority or direction of another. But here the surveyor is a public officer charged with the performance of various public duties, and bound by the express words of an Act of Parliament to obey the orders of the highway board, the board themselves being a public body incorporated for public purposes and having public

(1) Law Rep. 2 Q. B. 534.

(2) 1 P. Wms. 655.

duties to perform, and who, in ordering their surveyor to remove the obstruction in question, have acted *bonâ fide* and within the general scope of their duties and authority under the Act of Parliament.

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To determine this question we must first consider the provisions of the Act. By s. 17, "The highway board shall maintain in good repair the highways within their district; and it shall be the duty of the district surveyor to submit to the board an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district." And by s. 16, "The district surveyor shall act as the agent of the board in carrying into effect all the duties by this Act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties, and the assistant surveyor, if any, shall perform such duties as the board may require under the direction of the district surveyor;" and then there are further provisions, already referred to, enabling the board to obtain funds for the performance of their duties and the carrying of the Act into execution.

Now, where all the public highways in any district are well known and ascertained, no difficulty can arise in the execution of the Act. The surveyor inspects them and observes their condition; he makes his estimate of the expense of repairing and keeping them in repair during the ensuing year, and delivers it to the board, who thereupon direct him to effect the repairs from time to time accordingly, and he obeys their directions. But where, as here, he finds a highway which requires or will shortly require to be repaired, but the owner of the land gives him notice that the land is his private property and is no highway at all, what is the course to be pursued? We may suppose that upon his report an order has been given him to repair the highway, and when he proceeds to do so he finds a locked gate thrown across it, and he makes a report to that effect to the board. They, the board, after communicating with the owner of the land and finding that the question is raised and must be determined, highway or no highway, must next consider how this may most conveniently be done.

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They may indict the landowner for the obstruction, or they may do as they have done here, they may give him notice to remove the obstruction, and that in default of his doing so they will remove it themselves, and that he may try the question by bringing an action of trespass against them. They accordingly come to a resolution such as they have made here, and they give the order in question to the surveyor, and he in obedience to it removes the locks. If an action be then brought against the board they plead the highway, or defend under the general issue by statute, and the question is settled by the verdict of a jury and no difficulty arises. But if the law be that the landowner may select the surveyor as a defendant, in what condition is he placed? The board have ordered him to effect the necessary repairs, and for that purpose to remove the obstruction. He looks to the statute and he finds that its language is imperative, "He shall in all respects conform to the orders of the board," "and act as the agent" of the board in carrying the Act into effect. He has no means of ascertaining beforehand, or without the verdict of a jury, whether there is a highway or not, nor have the board themselves. He must therefore, at the risk of absolute ruin, obey the order as required by the Act, or he must refuse obedience; in other words, he must disobey the order wherever a highway is in dispute. The board cannot themselves in their own persons remove the obstruction any more than they can repair the highway. They must, therefore, either instruct their surveyor to act on their behalf or resort to some other mode, as by indictment, of raising the question, and if a public highway be established, perform their duty by putting it into repair.

I am not aware of any direct authority in reference to this Act of Parliament. But there are cases which establish a principle within which I think this case may be well decided. In *Buron v. Denman* (1) it was held by Parke, B., after consulting the other judges of the Exchequer, that where a naval officer had committed a series of trespasses for which he was personally liable to an action for damages, but the Crown had afterwards ratified his acts, that the ratification was equivalent to a prior command, and the action against him could not be maintained. Baron Parke himself

(1) 2 Ex. 167.

had some doubts whether the ratification had that effect, but the judges, including Baron Parke, were unanimous that the defendant, whose duty it was to obey the commands of the Crown, could not be made personally responsible in an action for the acts done in obedience to such command. In *Andrews v. Marris* (1), the clerk of a court of requests, whose duty it was to issue warrants or writs of execution at the orders of the commissioners, having mistaken the effect of an order, issued a precept without an authority, under which the plaintiff was taken in execution, and he was held liable in trespass accordingly. But it was also held that Whetham, the other defendant, one of the serjeants of the Court, and to whom the warrant was directed, and who actually made the arrest, was not liable to the action on the ground "that he was a ministerial officer of the commissioners bound to execute their warrants and having no means whatever of ascertaining whether they are founded upon valid judgments or are otherwise sustainable or not." It was further observed by the Court that there would be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant, and that "as the subject matter of this suit was within the general jurisdiction of the Commissioners, and the warrant appeared to have been regularly issued, the defendant Whetham was not liable." It appears to me that in this case the surveyor was in the exact position of Whetham in the case cited. *Dews v. Riley* (2) was a similar case. There a void order of commitment had been made by a county court under which the clerk of the court made out a warrant of commitment, and the plaintiff was arrested by a bailiff under that warrant. It was held that the action was not maintainable and the Court observed that "the clerk was a mere ministerial officer to carry into effect the order of the judge, and cannot be liable in trespass for the performance of the duty cast upon him by the express language of the Act of Parliament." And in *Keane v. Reynolds* (3), where trespass was brought, for pulling down a cottage which the magistrates had

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(1) 1 Q. B. 3.

(2) 11 C. B. 434; 20 L. J. (C.P.) 264.

(3) 2 E. &amp; B. 748.



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adjudged to be an encroachment within fifteen feet of the centre of a highway, and convicted the plaintiff of having made the encroachment, against the defendant who, as surveyor of the highways, had pulled down the cottage in the supposed execution of the Act 5 & 6 Wm. 4, c. 50, it appeared that the conviction was void, the way never having been repaired with stones or otherwise. But the Court held that the defendant was not liable to the action "on the principle that the surveyor acted in obedience to the judgment of a court of competent jurisdiction which he was bound to execute." It is true that in most of these cases the defendants who were held irresponsible were bailiffs or other officers acting in obedience or supposed obedience to the orders of a court or some legal tribunal made in the course of the administration of justice. But here, also, as in all these cases, the surveyor is a mere ministerial officer, bound by the express words of an Act of Parliament to obey the orders of the board, and having no means of knowing or ascertaining whether such orders are valid and lawful or otherwise, and the board itself is a public body, having public duties to perform and created and incorporated for public purposes. I know not, therefore, why this officer should not be protected by law as well as the subordinate officers of a court of justice.

It appears to me therefore, upon the whole case, that the defendants have acted throughout strictly within the scope of their authority and their duty. A complaint is made to the board that a highway is unlawfully obstructed. Upon investigating the case they find that an obstruction exists, but that it is disputed whether the spot is a public highway or not. Upon further inquiry they are advised and believe that it is a highway, and therefore that it is their duty to keep it in repair and free from obstructions. There are two modes in which this question, whether a public highway or not, may be raised and determined—by indictment and by action. They think, and I may venture to add I think also, that an action is preferable to an indictment, inasmuch as in a civil action points may be reserved, a motion made for a new trial, and appeals facilitated. They determine to try the question in that form accordingly. They give notice to the parties interested to remove the obstruction, and it is still persisted in,

and the opposite parties are resolved to try the question. They hold a meeting and make the order in question, and it is executed, and we are now called upon to decide whether this action, in which a controversy between the board on behalf of the public and the owner of the land is to be settled, should be brought against individuals who have acted as they believe in the strict performance of their duty in holding and attending a meeting, and resolving in their corporate character that the necessary steps shall be taken, and who may possess no funds or means to meet the expenses of the suit, or to pay damages or costs, or against the board, who are charged with the duties, and intrusted with the powers, and provided with the funds necessary to the management of the highways within the district and to carrying all the purposes of the Act into execution. The question as between the surveyor and the board is of equal importance, and is open in many respects to the same considerations. I think, therefore, and for the reasons I have assigned, that the action should have been brought against the board, and that this action is not maintainable.

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*Rule absolute.*

Attorneys for plaintiff: *Pattison & Wigg, for White & Dingley, Launceston.*

Attorneys for defendants: *Coode, Kingdon & Cotton, for Hawker, Boscastle.*

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July 6.

ATTORNEY GENERAL v. THE NORTH LONDON RAILWAY  
COMPANY.

*Railway Passenger Duty (5 & 6 Vict. c. 79, s. 4)—Cheap Trains Act (7 & 8 Vict. c. 85), ss. 6, 8, 9—Exemption from Duty—Third-class Passengers—Change of Carriages—Stopping at Stations—Power of Board of Trade to dispense with Conditions—Return Tickets—Workmen's Tickets.*

A train is a cheap train within s. 6 of the Cheap Trains Act (7 & 8 Vict. c. 85), and within the exemption from duty contained in s. 9, notwithstanding that the passengers are required at a junction, for the convenience of the traffic, to move from one train to another, provided there is no unreasonable detention so as to reduce the speed at which they travel below the minimum speed of twelve miles an hour, including stoppages, required by the Act.

The exemption from duty in s. 9 applies to fares by such a train not exceeding the parliamentary rate, although the tickets and carriages are not described as third-class tickets and carriages.

A train is not a cheap train within the Act, unless it stops at every ordinary passenger station; and the Board of Trade have no power under s. 8 to dispense with this requirement.

Return tickets issued at fares which, if the tickets were fully used, would not exceed the parliamentary rate, are not within the exemption of s. 9, if the fare for a single journey would exceed that rate.

*Semble*, that weekly workmen's tickets issued at fares which, if the tickets were fully used, would not exceed the parliamentary rate, would be within the exemption of s. 9, if issued to passengers travelling by a cheap train:

But, *held*, with respect to such tickets issued under a condition limiting the nature and amount of luggage to be carried without extra charge in a manner not in compliance with the conditions of s. 6, and without the dispensation of the Board of Trade under s. 8, that they were not within the exemption.

INFORMATION under 5 & 6 Vict. c. 79, s. 4, against the North London Railway Company and their general manager, praying for a declaration that the defendants were liable to pay duty at the rate of 5*l.* per cent. on certain passenger fares under that Act, and (par. 3) for an inquiry (if necessary) as to the trains run and the fares charged by the defendants.

The material facts appearing by the information and answer, and the sections of the statutes applicable to the questions at issue, are fully set out in the judgment.

June 5, 6. The case was argued for the Crown by *Sir Henry James, Q.C.* (*Sir R. Baggallay, A.G.*, and *W. W. Karslake*, with

him), and by *Sir J. B. Karlake, Q.C.* (*J. Brown, Q.C.*, and *F. M. White* with him), for the defendants.

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*Cur. adv. vult.*

July 6. The judgment of the Court (*Kelly, C.B.*, *Pigott*, and *Amphlett, B.B.*), was delivered by

AMPHLETT, B. This information is filed for the purpose of recovering from the defendant company certain passenger duties from which they claim to be exempted under the provisions of 7 & 8 Vict. c. 85 (commonly called "The Cheap Trains Act"). By s. 6 of that Act, after reciting that it was expedient to secure to the poorer class of travellers the means of travelling by railway at moderate fares and in carriages in which they might be protected from the weather, it was enacted that all passenger railway companies therein mentioned, and which would include the defendant company, should "by means of one train at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line belonging to or leased by them, so long as they should continue to carry other passengers over such trunk, branch, or junction line, once at the least each day on every week-day, except Christmas Day and Good Friday (such exception not to extend to Scotland), provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several Acts of Parliament, and with the immunities applicable by law to carriers of passengers by railway, and also under the following conditions, that is to say" (amongst others) :

"Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of the Privy Council for Trades and Plantations.

"Such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance travelled on the railway, including stoppages.

"Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line.

"The carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected against



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the weather in a manner satisfactory to the Lords of the said committee.

“The fare or charge for each third-class passenger by such train shall not exceed one penny for each mile travelled.

“Each passenger by such train shall be allowed to take with him half a hundred-weight of luggage, not being merchandise or other articles carried for hire or profit, without extra charge.”

By s. 7 a penalty is imposed on railway companies refusing or wilfully neglecting to comply with the provisions of that Act.

By s. 8 it was enacted that, “except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rate hereinbefore in such case provided, the lords of the said committee shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid, in consideration of such other arrangements” as therein mentioned.

And by s. 9 it was enacted, that “no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid.”

The defendant company have by various Acts of Parliament become the proprietors of a line of railway which may be called their main line, running northwards from Broad Street, in the city of London, up to a certain place called the Dalston Junction, and from thence dividing into two branches, one running to the east to Poplar, and the other to the west to Chalk Farm.

Before reaching Chalk Farm, a line of railway belonging to other companies diverges from this main line and runs to Richmond and Kew Bridge, and the defendant company have running powers over that line, and work the same, not as a separate line or branch, but in connection with their main line as hereinafter mentioned.

By arrangement the defendant company run some of their trains beyond Poplar to Blackwall, and elsewhere; but for the purposes of this judgment their line at this end may be considered as terminating at Poplar.

1. The defendant company work their system of railways as follows: Trains run continuously to and fro by the Dalston Junction between Broad Street and Poplar; other trains run continuously to and fro, also by Dalston Junction, between Broad Street and Chalk Farm, and between Broad Street and Richmond and Kew Bridge, or one of them. No trains have run for some time past continuously to and fro between Poplar and the stations to the west of Dalston Junction; but passengers desiring to go from Poplar, or any intermediate station between Poplar and Dalston Junction, to any other station to the west, take an up train from Poplar to Broad Street as far as Dalston Junction, and then join, after an interval of a few minutes only, a down train from Broad Street to Chalk Farm or other terminal stations to the west, as the case may be. Under these circumstances, we think that trains running from one end to the other from Broad Street to Poplar, or from Broad Street to Chalk Farm, Richmond, or Kew Bridge, or between other terminal stations on the defendants' system, and complying with the other requirements of the Act, are cheap trains within the meaning of the Act, and that exemption from duty in respect of the fare of passengers by any such train is not lost by their being required, for the convenience of the traffic, to move from one such train to another at Dalston Junction or any other station, provided there is no unreasonable detention at such station, so as to reduce the speed at which such passengers travel below the minimum speed required by the Act.

2. The defendant company only use two classes of carriages upon their lines, which are respectively called and marked first and second-class carriages. The fares charged to second-class passengers from any one terminal station to another terminal station, and indeed between most of the stations, do not exceed the Parliamentary rate of a penny a mile; and in all such cases second-class tickets only are issued. There are, however, a few cases where the fares to and from particular stations for second-class passengers exceed the Parliamentary rate, and in some of these cases, but not all, third-class tickets are issued at fares not exceeding the Parliamentary rate, and where third-class tickets

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are so issued, there being no third class carriages, the holders of second and third-class tickets are admitted to the same carriages, and are afforded the same accommodation in every respect.

The defendants claim exemption from duty in every case in which the fare charged to the holders of either second or third-class tickets do not exceed the Parliamentary rate of one penny a mile.

The claim to exemption is disputed by the Crown on various grounds; and, first, it was contended that, in the absence of any third-class carriages, a train ought not to be considered a cheap train within the meaning of the Act; and reliance was placed upon the preamble of the 6th section of the Act, and the express mention of third-class passengers in the body of the section, which, it was forcibly argued, shewed that the class of persons whose fares were to be exempted from duty were those who would ordinarily travel in third-class carriages, and not those who, if there were both second and third-class carriages, would prefer the former, even at a greater charge, in order to secure themselves from the discomfort of travelling in company with third-class passengers.

We are, however, of opinion that the objection ought not to prevail. There is no definition of a "third-class passenger" in the Act, and it would, we think, be unreasonable to hold that the question whether a person is a third-class passenger should depend upon the number affixed to his carriage or ticket, which might be changed at any moment. We apprehend that third-class passengers were mentioned in the 6th section of the Act, merely to shew that it was for that class of passengers only that the fares were to be compulsorily limited; leaving the companies to exercise their own discretion as to the fares to be charged to other passengers. It might otherwise have been held—as indeed is contended in the information, though not insisted upon in the argument before us—that no passenger by a cheap train of whatever class should be charged more than the Parliamentary rate. Suppose the company chose to run a Parliamentary train with only one class of carriages, such as are usually called third-class carriages, would it not be a cheap train within the meaning of the

Act? and would it be deprived of that character because the company gave the passengers the benefit of better or more commodious carriages?

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It was then contended on the part of the Crown, that even assuming that the train was not deprived of its character of a cheap train within the Act by the absence of third-class carriages, still that the fares of those only who asked for third-class tickets would be within the exemption, and that, if it be difficult or impossible to distinguish them from the others, the company have brought it upon themselves and cannot complain. Looking, however, at the language of the 9th section of the Act, where passengers generally, and not third-class passengers, are mentioned, we are of opinion that such distinction cannot be maintained, and that the fares of all passengers by a cheap train of whatever class are within the exemption, if not exceeding the Parliamentary rate.

It is easy to see that this construction may enable companies to claim exemption for the fares of passengers not within the purview of the Act; but that must be remedied, if thought advisable, by the legislature, and not by putting a strained meaning on the language of the Act as it stands.

3. It was next contended on the part of the Crown, that no train which did not stop at every ordinary passenger station between the terminal stations, and which did not carry passengers to all the stations at which they did stop at the Parliamentary rate, was a cheap train within the meaning of the Act, and that consequently the fares of no passenger travelling by it of whatever class would be within the exemption. And we are of that opinion.

It was but faintly contended on the part of the defendants that this would not be so on the construction of the Act alone; but it was said that the Board of Trade had dispensed with both these conditions. It is, however, our opinion that, even assuming that the Board of Trade, after the requisite knowledge of the fact, did de facto intend to dispense therewith (which, but for the admission on the part of the Crown, might have been very much doubted upon the evidence in the case), it was beyond their power to do so.



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By the 8th section of the Act the rates of fares are expressly excepted out of the dispensing power, and with respect to the stopping of trains we think that the dispensing power is confined to the condition (expressly so called) at the end of the clause, and does not extend to the requirements in the previous part of the clause, which appear to constitute the essential definition of a cheap train under the Act. If this be so, it seems to us that to make the clause consistent with itself, the passenger stations mentioned in the third condition, at which trains are to stop if required, must be taken to mean stations other than the ordinary passenger stations before mentioned, such, for instance, as those which are sometimes established for the convenience of private individuals, or particular works, or on particular days for the accommodation of market people.

The only other questions raised before us which are ripe for decision without further inquiry into the facts, are as to return tickets, and as to workmen's tickets.

4. With regard to return tickets, it appears that in some instances such tickets are issued to second-class passengers at fares which, assuming them to make full use of their tickets, would not exceed the Parliamentary rate, while the fare for a single journey over the same distance would exceed that rate; and we are of opinion that no exemption can be claimed in respect of such return tickets, since it appears to us to be the intention of the Act that a passenger whose fare is to be exempt should have the option of travelling for any part of his journey at the Parliamentary rate.

5. With regard to workmen's tickets (1), which are weekly

(1) By s. 45 of "The North London Railway (City Branch) Act, 1861" (which Act authorized the construction of the line from Broad Street to Kingsland) the company were required to run a train every morning in the week from Kingsland to Broad Street, and one train every evening from Broad Street to Kingsland, at such hours (not later than 7 a.m. nor earlier than 6 p.m.) as might be most convenient for the labouring classes residing at

or beyond Kingsland and having business in London, at fares not exceeding 1d. per passenger for each journey; and by "The North London Railway Act, 1867," s. 51, it was enacted that the company should not be required to issue a ticket to any artisan, mechanic, or daily labourer under the provisions of the Act of 1861 for a less period than one week; the applicant for a ticket was to give his name and address, and the name and address of

tickets accorded to artisans, mechanics, and daily labourers upon a special contract, it appears that the charge for every such ticket is 1s. only, which, if the holder availed himself of it every day in the week, would not exceed the Parliamentary rate; but such tickets are only issued for trains running from Dalston Junction to Broad Street, and not for any train which travels from one end to the other of any "trunk, branch, or junction line" of the defendants; and, moreover, the passengers availing themselves of these tickets are not allowed to take with them half a hundred-weight of luggage without extra charge, in compliance with the Cheap Trains Act, and we do not find any evidence or admission that the last condition has been dispensed with by the Board of Trade.

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We think, therefore, that under the present arrangements the fares of these workmen's tickets are not entitled to the exemption, although we should have been of a different opinion if such tickets were issued to passengers travelling by a cheap train as herein defined, and if the condition as to luggage were dispensed with, as it doubtless would be on application, by the Board of Trade.

Under these circumstances, the proper decree appears to us to be as follows:—

DECLARE. That every train running from one end to the other of the line, between Broad Street Station and Poplar Station, or between Broad Street Station and Chalk Farm, Richmond, or Kew Bridge, or between other terminal stations on the defendants' system of railways, and conveying passengers to and from such terminal and every intermediate ordinary passenger station at fares not exceeding the Parliamentary rate, and complying with the several other conditions mentioned in the 6th section of the Cheap Trains Act, so far as they have not been

his employer, and before issuing the ticket the company were to have a reasonable time to inquire whether he was an artisan, mechanic, or daily labourer within the meaning of the Act. And by s. 50 the compensation for injury to a passenger by such train was limited to 100*l.*, the amount to be fixed by arbitration.

The tickets in question were issued under these provisions; but one of the

conditions, subject to which they were issued, was as follows: "Each holder of a workman's ticket will be allowed to carry at his or her sole and exclusive risk any trade tools not exceeding 28*lbs.* weight, so packed as not to be inconvenient or dangerous. No other luggage of any description will be conveyed free of charge with the holders of workmen's tickets."

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properly dispensed with by the Board of Trade, ought to be considered a cheap train within the meaning of the Cheap Trains Act, notwithstanding there may be no third-class carriages in such train.

That the fares of passengers by such cheap trains are entitled to exemption from duty if they do not exceed the Parliamentary rate, whether the tickets issued to them are second or third class.

That such exemption is not lost by passengers being required, for the convenience of traffic, to move, at any particular station, from one such cheap train to another, provided there is no unreasonable detention at such station, so as to reduce the speed at which such passengers travel below the minimum speed required by the Act.

That no train ought to be considered a cheap train within the meaning of the Act, whether approved by the Board of Trade as a cheap train or not, which does not stop at every intermediate ordinary passenger station, and which does not convey some class of passengers to and from every station, at fares not exceeding the Parliamentary rate, and that no exemption ought to be allowed in respect of the fares of passengers by any such train, notwithstanding such fares may not exceed the Parliamentary rate.

That the fares received for return tickets are not exempt from duty, unless the fares that would be charged to the same class of passengers for the single journey over the same distance would not exceed the Parliamentary rate.

That the fares received for workmen's tickets under the existing arrangements are not exempt from duty.

DIRECT, in case the parties differ, an inquiry as prayed in the 3rd paragraph of prayer, regard being had to the above declarations.

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for defendants: *Paine & Layton.*

June 26.

[IN THE EXCHEQUER CHAMBER.]

THE LIVER ALKALI COMPANY v. JOHNSON.

*Common Carrier—Fixed Termini—Definite Route—Conveyance of a Single Customer's Goods—Barge-owner.*

The defendant was a barge-owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods:—

*Held*, affirming the judgment of the Court below, that the defendant in

exercising this employment had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part.

By Brett, J. The defendant was not a common carrier nor liable as such, but was liable as a ship-owner carrying goods for hire, upon the custom applicable to him as such.

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APPEAL by the defendant from a decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant. (1)

June 20. *C. Russell, Q.C.* (*Butt, Q.C.*, with him), argued for the defendant; and *T. H. James (Aspinall, Q.C.*, with him), for the plaintiffs.

The following authorities, in addition to those cited in the court below (2), were referred to:—

Abbott on Shipping, 11th ed. p. 277; Angell on Carriers, 4th ed. p. 59; Jones on Bailments, 4th ed. p. 106; *Elsee v. Gatward* (3); *Rich v. Kneeland* (4); Kent's Commentaries, lect. 40, part 4; *Laveroni v. Drury*. (5)

*Cur. adv. vult.*

June 26. The following judgments were delivered:—

BLACKBURN, J. It appears by the case stated for this Court on appeal that the defendant was engaged in carrying from Widness to Liverpool some salt cake of the plaintiffs in a flat on the river Mersey. The goods were injured by reason of the flat getting on a shoal in consequence of a fog. This was a peril of navigation, but could in no sense be called the act of God or of the Queen's enemies.

The jury found that there was no negligence on the part of the defendant.

The question, therefore, raised is, whether the defendant was under the liability of a bailee for hire, viz., to take proper care of the goods, in which case he is not responsible for this loss, or whether he has the more extended liability of a common carrier, viz., to carry the goods safe against all events but acts of God and the enemies of the Queen.

(1) Law Rep. 7 Ex. 267.

(3) 5 T. R. 143.

(2) Law Rep. 7 Ex. at pp. 268, 269.

(4) Cro. Jac. 330.

(5) 8 Ex. 166; 22 L. J. (Ex.) 2.



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We have purposely confined our expressions to the question, "whether the defendant has the liability of a common carrier," for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him.

The rule imposing this extended liability on common carriers was originally established, as Lord Mansfield states, in *Forward v. Pittard* (1), on the ground of public policy: "To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man." And Lord Holt explains it, in the celebrated judgment in *Coggs v. Bernard* (2), as existing in the case of one that exercises a public employment: "And this is the case of the common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Morse v. Slue*. (3) And this is a politic establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing." It is too late now to speculate on the propriety of this rule, we must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability. It appears from the evidence stated that the defendant was the owner of several flats, and that he made it his business to send out his flats under the care of his own servants, different persons as required from time to time, to carry cargoes to or from places in the Mersey, but that it always was to carry goods for one person at a time, and that "he carried for any one who chose to employ him, but that an express agreement was always made as to each voyage or employment of the defendant's flats," which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by any one. We think that this describes the ordinary employment of a lighter-

(1) 1 T. R. 27, at p. 33.

(2) 2 Ld. Raym. at p. 918.

(3) 1 Vent. 190, 238.

man, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries.

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It was argued before us that the defendant could not have this liability unless he held himself out as plying between two particular places, or had put up his flat, like a general ship, to go to some particular place, and take all goods brought him for that voyage.

It was urged that in *Morse v. Slue* (1) the goods were probably put on board a ship put up as a general ship. It certainly may have been so, but the count is set out in *Ventris* and is general, that by the law and custom of England charterers and governors of ships which go from London beyond sea are bound, &c., and the ultimate decision was that this count was proved. Hale, C.J., seems to have had a difficulty from the fact that the ship was bound to foreign parts, and that the shipowner would not by the civil law or the maritime law be chargeable for piracy or *damnum fatale* (a difficulty, it may be remarked, which does not apply to the present case, where the whole transaction is in England), but nothing is in any report said as to the ship being a general ship. And on that count no judgment could have been given on that ground.

The ultimate decision on the special verdict has always been understood to apply equally to all ships employed in commerce and sailing from England, as is shewn from the forms of charter-party and bill of lading in ordinary use in England, which always contain an engagement to deliver the goods in the same condition they were received aboard, and, when Lord Tenterden first wrote, contained only an exception of the dangers of the seas; now the exceptions in each class of instrument are much more extensive. And certainly it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people.

To come nearer to the particular case, we find that "lightermen"

(1) 1 Vent. 190, 238.

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are specially named in Bacon's Abridgment "Carrier" (A.), and in the notes to *Coggs v. Bernard*. (1) In *Lyon v. Mells* (2) the course of business of the defendant is thus described: "The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops, and when he had not employment for his lighters in his own business, he let them for hire to such persons as wanted to carry goods to other sloops." If there be any difference between the employment of the now defendant, as described in this case, and the employment of the defendant in *Lyon v. Mells* (2), it would seem that the latter was less clearly a public employment. The great point discussed was, whether a notice limiting the liability of the defendant was, as Lord Ellenborough states it, illegal, as being "to exempt him from a responsibility cast on him by law as a carrier of goods by water for hire," a proposition which could not well have been discussed by any one who did not think that the defendant had, but for the notice, incurred that responsibility. The point actually decided was, that the terms of the notice did not relieve the defendant from liability for furnishing an unseaworthy lighter. As to this Lord Ellenborough says: "Every agreement must be construed with reference to the subject matter, and looking at the parties to this agreement (for so I denominate the notice), and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where the law would otherwise have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against." We think that Mr. James, in arguing for the plaintiff in this case, was right when he relied on *Lyon v. Mells* (2) as an important authority in favour of his client.

It is true that the point was not precisely decided in *Lyon v. Mells* (2), and if it had been, it would not have been binding upon us in a Court of Error; but the opinion of Lord Ellenborough, and (as far as we can judge from the report) of every one concerned in the case, was that it was too clear for argument that, but for

(1) 1 Sm. L. C. 6th ed. 177.

(2) 5 East, 428.

the notice, the lighterman, acting as the defendant did in that case, would have been liable to the same extent as a common carrier. Lord Abinger, in *Brind v. Dale* (1), expressed a strong opinion that a town carrier could not be considered a common carrier; but he reserved the point, and as the jury found in favour of the defendant on the question whether the goods were received by him as a common carrier, it never was reviewed in banc.

The ruling of Alderson, B., in *Ingate v. Christie* (2), is in express conformity with what appears to have been Lord Ellenborough's view in *Lyon v. Mells* (3), and no English authority has been cited in conflict with this doctrine.

We think, therefore, that the judgment below was right, and should be affirmed.

MELLOR, ARCHIBALD, and GROVE, JJ., concurred.

BRETT, J. I cannot come to the conclusion that the defendant in this case was liable whether he was a common carrier or not, because I conclude that he was liable, notwithstanding that I am clearly of opinion that he was not a common carrier. It seems to me that it is of the very essence of the definition of a common carrier, that he should be one who undertakes to carry the goods (not being dangerous, or of unreasonable weight or bulk) which are first offered to him—he who does not so undertake is not a common carrier. The force of the word “common” is not that the carrier's business is a public one, or “in common with others,” but that he undertakes to carry for all indifferently in the sense of for the first comer, i.e., “for all in common.” It is clear to my mind that a shipowner who publicly professes to own sloops, and to charter them to any one who will agree with him on terms of charter, is not a common carrier, because he does not undertake to carry goods for or to charter his sloop to the first comer. He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant in the present case, in my

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(1) 2 Mood. & Rob. 80, at p. 83;  
S. C. 8 C. & P. 207.

(2) 3 C. & K. 61.  
(3) 5 East, 428.



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opinion, carried on his business like any other owner of sloops or vessels, and was not a common carrier, and was in no way liable as such. But I think that, by a recognised custom of England,—a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions.

I think that this liability attaches to shipowners carrying goods, by reason of recognised custom, which may be pleaded as the custom of England, just as the custom of England as to common carriers may be pleaded. But it is a custom wholly independent of the similar custom with regard to common carriers. The similarity of the two customs has occasioned phraseology to be used in some cases which has raised an inaccurate idea that shipowners are common carriers; but I am of opinion that they are not. They are not bound to carry for the first comer. I therefore hold that the defendant is liable as a shipowner, upon the custom applicable to him as such, but is not liable as a common carrier, upon the custom applicable to that business or employment.

*Judgment affirmed.*

Attorneys for plaintiff: *Wright & Venn, for J. & R. Quinn, Liverpool.*

Attorneys for defendant: *Field & Roscoe, for Bateson & Co., Liverpool.*

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COPIN *v.* STRACHAN.

May 8.\*

*Foreign Judgment—Liability of English Shareholder in a Foreign Company—  
Effect of taking Shares—Agreement to submit to Jurisdiction—Service of  
Notice at elected Domicile.*

To an action on a French judgment, the defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.

Replications. (1.) That the defendant was holder of shares in a French company, having its legal domicile at Paris, and became thereby subject, by the law of France, to all the liabilities, &c., belonging to holders of shares, and, in particular, to the conditions contained in the statutes or articles of association; that by these statutes it was provided and agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile, and, in default, election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated; and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen; that the company became bankrupt, and defendant's unpaid calls became payable to the plaintiff, as assignee; that he made default and provoked a contest; that he never elected a domicile, and thereupon the plaintiff caused summonses, &c., to be served at the office aforesaid; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon judgment by default was recovered against him. (2.) A similar replication, alleging that defendant was a shareholder as in the 1st replication mentioned, and stating provisions of the law of France to the same effect as those contained in the above-mentioned statutory articles of association, but omitting all reference to the statutes or articles of association, and alleging that defendant did not elect a domicile, and also that the company became bankrupt, &c., and that a summons was served as in the 1st replication stated. On demurrer:—

*Held*, that the 1st replication was good, and (by Amphlett and Pigott, BB., Kelly, C.B., dissenting) that the 2nd replication was bad.

In these two actions the pleadings, which, so far as they are material to this report, were identical, are as follows:—

Declaration by the assignee in bankruptcy of the Société de Commerce de France, Limited, on a judgment for 15*l.* 15*s.* recovered on the 7th of February, 1867, in the empire of France, by him against the defendant in the Court of the Tribunal of

\* Decided in Easter Term.

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Commerce of the Department of the Seine, being a court duly holden, and having jurisdiction in that behalf.

Plea. 3. That the suit was commenced, according to the French law, by process and summons, and that the defendant was not at any time previous to the recovery of judgment resident or domiciled within the jurisdiction of the said Court, nor is he a native of France, and he was not served with any process or summons, nor did he appear, nor had he any notice or knowledge of any process or summons, or any opportunity of defending himself.

Replications. 1. That before the suit in which judgment was recovered the defendant became, and was the holder of divers shares in a company lawfully existing in France, and being the company in the declaration mentioned, having its seat or place of business and legal domicile at Paris, in the Department of the Seine, and within the jurisdiction of the Court of the Tribunal of Commerce of that department; and the defendant then became, and thereby was, by the law of France, subject to all the liabilities, rights, and privileges belonging to the holders of shares in the company, *and in particular to the regulations, conditions, and stipulations contained in the statutes or articles of association, and by those statutes, or articles, it was provided and agreed that all disputes which might arise during the liquidation of the company between (amongst others) the shareholders and the company with respect to the affairs of the company, should be submitted to the jurisdiction of the competent tribunal of the department of the Seine, and that every shareholder who should provoke a contest must elect a domicile at Paris, and that, in default of election, election should be made of full right at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, or notice of process, should be validly and effectually served at the domicile formally or impliedly chosen; that whilst the defendant was a shareholder the company was declared bankrupt, according to the law of France, and the plaintiff was appointed assignee, and the whole amount unpaid on the defendant's shares became payable to the plaintiff, and the defendant made default in payment and provoked a contest within the meaning of the statutes or articles; that the defendant never formally elected a domicile at Paris, or*

elsewhere in France, and thereupon the plaintiff, to recover the amount due to him, did, according to the law of France and practice of the Court of the Tribunal of Commerce, cause a summons, directed to the defendant, to issue, calling on him to appear and answer the plaintiff in an action for the amount unpaid on his shares; that the plaintiff caused the summons to be delivered for the defendant at the office of the imperial procurator of the civil tribunal of the department where the company's office was situated; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular, and by the law of France and practice of the Court amounted to notice to the defendant then having his real domicile out of France; that he was bound to appear, but did not, whereupon judgment by default was recovered against him.

2. That before the suit, &c., the defendant became and was the holder of divers shares in a company lawfully existing in France, and being the company in the declaration mentioned, and thereby became, and was, by the law of France, subject to all the liabilities, &c., belonging to the holders of shares of the company according to the law of France; that the company had its seat or place of business at Paris, in the department of the Seine, and within the jurisdiction of the Court of the Tribunal of Commerce of that department, and the defendant was resident and domiciled in England, and by reason and in consequence thereof, it became and was the right and duty of the defendant, according to the law of France, upon his becoming the holder of such shares to elect a domicile within France, to wit, at Paris, at which notices should be served upon him, and to notify to the directors or administrators of the company such elected domicile; that it was and is the law of France, that if a shareholder in such a company, who is resident and domiciled abroad, shall neglect to elect and notify a domicile within France, it should be lawful for the directors, &c., to serve such shareholder with notice of process at the domicile of the public procurator of the tribunal of the place where the company have their seat or place of business and legal domicile, and that such domicile should be taken to be the domicile of election of such shareholder for the purpose of such

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service, and such service should be as valid and binding as though made on him personally, and that such shareholder so served with notice should be subject to the jurisdiction of such tribunal in respect to the demand of the directors, &c., against him; that the defendant did not elect or notify a domicile in France; that whilst he was a shareholder the company was declared bankrupt according to the law of France, and the plaintiff was appointed assignee, and the whole amount unpaid on the defendant's shares thereupon became due and payable to the plaintiff; and thereupon the plaintiff, according to the law of France and practice of the Court of the Tribunal of Commerce of the Department of the Seine, being the Court within the jurisdiction of which the seat or place of business and domicile of the company were, caused a summons, &c.—[Then followed averments as to the service and regularity of the notice, &c., similar to those in the previous replication.]

Demurrer to 1st and 2nd replications and joinder.

The cases were argued on the 29th of April and the 4th of May, 1874, by *Benjamin, Q.C.* (*Holl* and *Sydney Hastings* with him), and by *Holl*, for the plaintiffs respectively in the two actions; by *Matthews, Q.C.* (*R. E. Webster* with him), for the defendant Adamson, and by *French (C. Russell, Q.C.,* with him), for the defendant Strachan. The following authorities were cited: *New Brunswick and Canada Ry. Co. v. Conybeare* (1); *Bank of Australasia v. Harding* (2); *Bank of Australasia v. Nias* (3); *Meeus v. Thellusson* (4); *Vallée v. Dumergue* (5); *Fergusson v. Fyffe* (6); *General Steam Navigation Co. v. Guillou* (7); *Schibbsby v. Westenholtz* (8); *Godard v. Gray*. (9)

*Cur. adv. vult.*

May 8. KELLY, C.B. [after stating the pleadings, proceeded as follows:—] The difference between these two replications is this, that in the first it is alleged that the defendant being a shareholder in the company, was as such bound by the articles of asso-

(1) 9 H. L. C. 711.

(2) 9 C. B. 661; 19 L. J. (C.P.) 345.

(3) 16 Q. B. 717; 20 L. J. (Q.B.) 284.

(4) 8 Ex. 638; 22 L. J. (Ex.) 239.

(5) 4 Ex. 290; 18 L. J. (Ex.) 398.

(6) 8 Cl. & F. 121.

(7) 11 M. & W. 877.

(8) Law Rep. 6 Q. B. 155.

(9) Law Rep. 6 Q. B. 139.

ciation, and by reason of those articles of association was liable to be sued in the French court, whilst in the second it is merely alleged that by the law of France he as a shareholder in the company became liable to be sued in the French court under the circumstances stated. Now the questions raised by these two replications are entirely questions of law; and before proceeding to deal with the authorities I will very shortly state what I conceive to be the law bearing upon them. I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively; and if that company, by the law of the country in which it exists, or by the articles of its constitution, is subject to the jurisdiction of a particular court within that country, so also is each shareholder or member subject to its jurisdiction in all cases in relation to or connected with such company.

It was contended, on the part of the defendant, on the authority of *Schibsby v. Westernholz* (1), that he not being a native or subject of France, and so subject to French law, and not being either resident or domiciled in France, and not having received notice or had knowledge de facto of the suit which resulted in the judgment relied on in the replications, is not bound by that judgment. Now in that case the decision was that “the judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant, at the time the suit commenced, was not a subject of or resident in the country in which judgment was obtained; for there existed nothing imposing on the defendant any duty to obey the judgment;” and the law is well and, in my judgment, rightly stated thus in the judgment of Blackburn, J. (at

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(1) Law Rep. 6 Q. B. 155.

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p. 161):—"Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, then we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think that the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of these suppositions is negatived in the present case." It is to be observed that in that case no fact was found imposing on the defendant the duty of obeying the judgment. The case was not one of a person alleged to be bound by the law of a foreign country and the judgment of a foreign tribunal by reason of his having become a shareholder in a company existing only under the law of that country, but it was one of a contract between the plaintiff, who was resident in England, and defendant, who was resident in France, for the sale and delivery of merchandise. There was nothing to prevent the French seller suing the English buyer here for breach of contract, and nothing which rendered the latter amenable to a French tribunal. In the present case we have to consider the law as applicable, not to an ordinary mercantile contract, but to persons who, though not resident in the foreign country, have become members of what we should call a joint stock company, existing only in that country, and subject to its laws. I have stated already what I consider to be the law governing such cases, and I now proceed to advert to some of the other authorities which were cited on the argument.

The first case to which it is necessary to refer is the *Bank of Australasia v. Harding* (1), of which the marginal note is as follows:—"The members resident in England of a company formed for the purpose of carrying on business in a place out of England are bound in respect of the transactions of that company by the

(1) 9 C. B. 661; 19 L. J. (C.P.) 345.

law of the country in which the business is carried on." This proposition of law is really decisive of the present case, and it is fully borne out by the facts, which deserve to be examined somewhat in detail. The defendant Harding, it appeared, was sued on a judgment against him obtained in Australia, where a company was established, of which he had become a member. He was not resident in the colony nor subject to its laws, unless by becoming a shareholder he became so. The company was itself established by a colonial statute, which "may be assumed," says Wilde, C. J. (at p. 685), "to have been obtained at the request of the parties. It provided that one member holding a principal office in the company might sue or be sued instead of the whole body, and that execution might issue against the property of the other members. But while giving this benefit to the company, the Act provides that the rights and liabilities of the parties should not be varied. Now, independently of the colonial Act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and if the judgment had been recovered in an action brought against all the members jointly an action of debt or assumpsit would clearly have lain against the defendant upon that judgment." Granting, therefore, that in an action against all the members the defendant would have been responsible, the question arose whether he was responsible in an action on a judgment obtained in the colony against the chairman or principal officer, who under the colonial Act was liable instead of all the members. The defendant set up the same defence as is relied on here—that he was not resident in the colony, and had no notice or knowledge of the proceedings. But the answer was that by becoming a member of the company which existed only in the colony, and by virtue of its laws, he had, in all matters relating to the company, himself become bound by the colonial law, and subject to the jurisdiction of the colonial courts. "I am of opinion," says Cresswell, J. (at p. 687), "that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial Act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company might be brought against the chairman, and

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that the chairman should for all purposes represent him in such actions. Being his own appointed agent he had notice of the proceedings. If he had been resident in the colony he could not have made himself party to the action or in any way personally interfered in the proceedings." Now how had the chairman been appointed his agent? Simply by virtue of the defendant having become a member of the company; and therefore, service of process on the chairman, who by the law of the colony was liable to be sued, was held a service upon the defendant, although he was not resident or domiciled in the colony, and had never himself heard of the proceedings. The answer to the defendant's plea that he was non-resident and had no notice "is," says Talfourd, J., in his judgment (at p. 688), "that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there to be regulated by the law of the colony." It certainly seems to me impossible to have an authority more directly in point, and the *Bank of Australasia v. Nias* (1) is to the same effect.

But there is one more case to which I ought to refer: that of *Vallée v. Dumergue*. (2) There to an action on a French judgment the defendant pleaded that he was not, during the accruing of the cause of action, &c., resident in France, or within the jurisdiction of the Court, nor subject to the law of France; that he was never served with any process or notice, or had any notice of the proceedings; nor did he appear in court or have any opportunity of defending himself, and the proceedings were taken in his absence and without his knowledge. The plaintiff replied that, the defendant became a shareholder in a certain company in France, and subject to all the liabilities and rights thereto attaching; that the defendant was resident in England, and by reason thereof it became necessary, by the law of France, for the defendant to elect a domicile in France at which the directors might notify to him all proceedings relative to the company or the defendant as such shareholder; that by the law of France all legal proceedings affecting any party having his real domicile out of that kingdom left for him at such elected domicile were as valid as if left at his real domicile in France; that the defendant made election of a

(1) 16 Q. B. 717; 20 L. J. (Q.B.) 284. (2) 4 Ex. 290; 18 L. J. (Ex.) 398.

domicile at Paris, and gave notice thereof to the plaintiffs; that the assets of the company being insufficient to discharge their debts, the defendant, as a shareholder, was, by the law of France, liable to be sued and to pay a certain sum; that the plaintiffs, for the recovery thereof, caused a summons to be left at his elected domicile, requiring him to appear in court on a certain day; that he did not appear, whereupon the plaintiffs recovered judgment by default. This replication was held good on demurrer, and so far, at all events, as regards the second replication demurred to, which alleges that the defendant was bound by the "law of France" to elect a domicile, it is conclusive. The only difference is that there the defendant did elect, whilst here he failed to elect and the election was made for him. But in that case, as in this, service was effected at the elected domicile, and in this case, as in that, I think such service was a good service upon the defendant, although he was not there, and never heard of the proceedings against him.

Upon all these authorities, therefore, it appears to me that the defendant is liable, and the principles they establish are, in my opinion, reasonable and just. The defendant, as a shareholder in this foreign company, becomes entitled to all the benefits resulting from the possession of the shares; surely it is very reasonable that the law of France, and, as is alleged in the first replication here, the articles of association also, should provide that he should elect a domicile, and that if he does not, one may be elected for him, at which process, if necessary, may be served. Otherwise it might be that a shareholder might for years receive all the benefits belonging to his position and yet escape all the burthens, just because his real domicile was out of the kingdom of France, or there were no means of discovering where he might be and enforcing a demand upon him. My judgment, therefore, is for the plaintiff upon both the replications demurred to.

AMPHLETT, B. An important question is raised on these replications, involving the liability of a British subject to be sued in the courts of a foreign country. As to the first replication demurred to, the Court is unanimously of opinion that the defendant is shewn upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that

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he would, under the circumstances disclosed, be amenable to the jurisdiction of the Court of the Tribunal of Commerce of the Department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to shew that the defendant's contract is to be governed by French law, still that they do not shew that he is subject to the jurisdiction of the French Court. The contract must be interpreted by an English tribunal.

Now the plaintiff seems to have thought that all he need allege is that French law is to govern the contract. But it by no means follows that the defendant has subjected himself to a foreign jurisdiction. The cases which have been referred to shew that before an Englishman can be made amenable to a foreign Court he must bear either an absolute or a qualified or temporary allegiance to the country in which the Court is. He must, as is pointed out by Blackburn, J., in *Schibsby v. Westenholz* (1), be a subject of the country, or as a resident there when the action was commenced (or perhaps it would be enough if he were there when the obligation was contracted, though upon this point doubt is expressed), so as to be under the protection of or amenable to its laws. The learned judge also puts two other cases in which a person might be bound, one where he, as plaintiff, has selected his tribunal, and the other where he has voluntarily appeared before it and takes the chance of a judgment in his favour. The defendant's liability in the latter case, however, is left an open question. But independently of that question, I apprehend that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision. It is upon this ground that I decide the demurrer to the first replication in the plaintiff's favour. I think that the defendant must be taken to have agreed that if he did not elect a domicile one should be elected for him; for the articles of association provide for its being done. It is said that it is not sufficiently stated that he had notice of this particular provision, but I think it must be implied that he had notice, from the fact of his becoming a shareholder in the company.

(1) Law Rep. 6 Q. B. 155, at p. 161.

I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests? Suppose there had been a provision by the law of France that whenever a member neglected to elect a domicile he should pay double calls, are we to enforce his liability in an action on a judgment for such calls obtained against him without his knowledge in the foreign court? No doubt in the present case, where the law of France is in question, the probability is that the shareholder would not be subjected to any extraordinary or unjust liabilities. But if the principle of law is that which the plaintiff contends for, it must be applied in cases of countries where the law might be very much more open to objection than it is likely to be in a country such as France.

It is said, however, that the authorities upon the point are decisive, and two were especially relied on. The first was the *Bank of Australasia v. Harding* (1), and it is, I agree, a strong authority in support of the first replication, but not of the second. In that case there had been a local Act obtained giving power to the company's creditors to obtain judgment against a representative of all the members, and enacting that by that judgment all the members should be bound; and it was upon the circumstance that the Act existed that the judgment of the Court was founded, and nothing falls from any of the judges to indicate that they would have held the defendant bound if there had been no such Act. In their opinion the defendant was to be considered as a consenting party to the passing of the Act, or as one of the parties at whose

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(1) 9 C. B. 661; 19 L. J. (C.P.) 345.



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request it was passed, and therefore bound by its provisions: see per Wilde, C.J., and Cresswell, J., at pp. 685, 687. In the absence of such consent, it seems to me that the Court would have come to a contrary conclusion.

The second case relied on was *Vallée v. Dumergue* (1), but here again, although the decision supports the first, it fails to support the second replication. There the defendant had become by transfer the owner of shares in a French company, and upon accepting the shares was bound, according to French law, to elect a domicile. He actually did so, and gave notice of his election to the company. He was, therefore, aware of what the French law was, and had complied with it. Then, having left the country, notice of process was, as here, left at the elected domicile, but never reached the defendant against whom judgment by default was recovered. It was held he was liable on the judgment, but upon the ground that he had done something more than become a shareholder in the company; he had so conducted himself as to warrant the inference that he had agreed to be bound by the decision of the foreign Court. "The replication consists," says Alderson, B. (at p. 303) "of a statement of facts which shew that by the agreement to which the defendant has become a party, no actual notice need be given to him;" and again (at p. 303) "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode has been followed, even though he may not have had actual notice of them."

For these reasons my judgment (in which my Brother Pigott concurs) is for the plaintiff upon the demurrer to the first replication, and for the defendant upon the demurrer to the second.

*Judgment accordingly.*

Attorneys for plaintiff: *Deane & Chubb.*

Attorneys for defendant Adamson: *Rowland & Miller.*

Attorneys for defendant Strachan: *Argles & Rawlins.*

(1) 4 Ex. 290; 18 L. J. (Ex.) 398.

END OF TRINITY TERM, 1874.





THE  
LAW REPORTS.

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Court of Exchequer.

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REPORTED BY  
JAMES ANSTIE, ARTHUR CHARLES, ARTHUR P. STONE,  
AND JAMES M. MOORSOM,  
BARRISTERS-AT-LAW.

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EDITED BY  
JAMES REDFOORD BULWER, Q.C.

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1875.





JUDGES  
OF  
THE COURT OF EXCHEQUER,

XXXVIII VICTORIA.

The Right Hon. Sir FITZROY KELLY, Knt., C.B.  
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.  
Sir GILLERY PIGOTT, Knt.  
Sir ANTHONY CLEASBY, Knt.  
Sir CHARLES EDWARD POLLOCK, Knt.  
Sir RICHARD PAUL AMPHLETT, Knt.  
Sir JOHN WALTER HUDDLESTON, Knt.

ATTORNEY GENERAL:

Sir RICHARD BAGGALLAY, Knt.

SOLICITOR GENERAL:

Sir JOHN HOLKER, Knt.



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AND BY THE

## COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXVIII VICTORIA.

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BRADBURN *v.* THE GREAT WESTERN RAILWAY COMPANY.

1874

*Negligence—Railway Company—Insurance—Damages.*

Nov. 6.

In an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.

ACTION brought to recover damages for injuries sustained by the plaintiff through the defendants' negligence, while he was travelling as a passenger on their line. The cause was tried at Stafford, before Pigott, B., at the last Summer Assizes. The jury found a verdict for the plaintiff for 217*l.*; but, as it appeared that he had received a sum of 31*l.* on account of the accident upon an insurance effected by him with the Accidental Insurance Company, it was contended by the defendants that that sum ought to be deducted from the sum at which the jury assessed the damages. The learned judge, after consulting with Lord Coleridge, C.J., directed the verdict to be entered for the whole sum, but reserved leave to the defendants to move to reduce the verdict by 31*l.*



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*Huddleston, Q.C.*, moved accordingly. The plaintiff's loss from the accident was partly compensated by what he received from the insurance company by reason of the accident. The case of *Yates v. Whyte* (1) is distinguishable on the ground that the policy there was strictly a contract of indemnity, and the plaintiff was to hold the proceeds of the action in trust for the underwriters so far as they had indemnified him. (2) The direction of Lord Campbell, C.J., to the jury in *Hicks v. Newport, &c., Ry. Co.* (3), in an action brought under 9 & 10 Vict. c. 93, is more applicable; there the whole sum received on an accident policy was deducted.

BRAMWELL, B. Clearly there must be no rule. The jury have found that the plaintiff has sustained damages through the defendants' negligence to the amount of 217*l.*, but it is said that because the plaintiff has received 31*l.* from the office in which he insured himself against accidents, therefore the damages do not amount to 217*l.* One is dismayed at this proposition. In *Dalby v. India and London Life Assurance Company* (4) it was decided that one who pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shews that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendants' negligence.

As to the case of *Hicks v. Newport, &c., Ry. Co.*, that was an action brought under Lord Campbell's Act, and the ruling is quite correct. The statute had laid down no rule as to the mode of

(1) 4 Bing. N. C. 272.

(2) In *Yates v. Whyte* (4 Bing. N. C. at p. 285), Bosanquet, J., after referring to the similar case of *Mason v. Sainsbury* (3 Doug. 60), says, "There the action was brought for the benefit of the underwriters; here the plaintiff sues on his own account. But I think

that makes no difference; for he has the legal right to the damages, and if the underwriters have an equitable right, they will establish it in another court."

(3) 4 B. & S. 403, note to *Pym v. Great Northern Ry. Co.*

(4) 15 C. B. 365; 24 L. J. (C.P.) 2.

calculating the damages to be given in respect of the right of action which it created. The rule was first laid down in this court (1), and that rule was, that the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account. But that has no bearing on the case of a person suing upon his common law right for injuries caused to him by the defendants' negligence.

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PIGOTT, B. I am of the same opinion. The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

AMPHLETT, B., concurred.

*Rule refused.*

Attorneys for defendants: *Young, Maples, & Co.*

(1) *Franklin v. South Eastern Ry.* 296; 27 L. J. (C.P.) 227, and *Pym v. Co. 3 H. & N. 211*, followed in *Dalton Great Northern Ry. Co.* 4 B. & S. 396; *v. South Eastern Ry. Co.* 4 C. B. (N.S.) 32 L. J. (Q.B.) 377.

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Nov. 14.

NIELD AND ANOTHER *v.* THE LONDON AND NORTH WESTERN  
RAILWAY COMPANY.

The defendants, owners of a canal, being threatened by an overflow of flood water from a neighbouring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiffs' premises, which were also situated on the banks of the canal above the premises of the defendants, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiffs' premises. In an action brought to recover damages for the injury so caused:—

*Held*, that the defendants were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it.

ACTION to recover damages for injury caused to the plaintiffs' premises through water which was, as the plaintiffs alleged, thrown upon them through the act of the defendants in placing a barricade across their canal, by the side of which the plaintiffs' premises were situated.

At the trial of the cause before Brett, J., at the Manchester summer assizes, 1873, the learned judge non-suited the plaintiffs upon the opening of Counsel, reserving leave to the plaintiffs to move to enter a verdict for them (the damages to be assessed by an arbitrator) if on an agreed statement of facts the Court should be of opinion that they were entitled to maintain the action.

The following statement of facts was subsequently agreed upon:—

1. The plaintiffs are the occupiers of land, and of a cotton mill built thereon in the year 1856.

2. The defendants are the owners of, and have the control and management of, the Huddersfield Canal, which extends from Huddersfield to Ashton-under-Lyne, and there forms a junction with another canal extending to Manchester.

3. The Huddersfield Canal was constructed pursuant to an Act of Parliament passed in 1794. (1)

(1) No reference was made on the argument to the provisions of this Act.

4. The river Tame, which rises in the Saddleworth hills, is at a distance of about seventy yards from the canal at the point, nearly opposite to the plaintiffs' premises, where the water flowing from the river made its way into the canal as mentioned below.

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5. The canal is not supplied with water from the river, and does not communicate with it in any way whatever.

6. On the 13th of July, 1872, there was an extraordinary rainfall, and the water of the Tame began rapidly to rise, overflowing its banks and flooding the adjacent fields.

7. The water in the canal stood, previous to the flood, at or about its ordinary level, that is to say, about nine or ten inches below the coping stone of the towing path on both sides of the canal.

8. As the flood from the river continued to increase, the manager of the canal became apprehensive that the water from the river might enter the canal and injure the defendants' warehouses and premises situated on its banks.

9. At a point in the canal above the defendants' warehouses, but below the premises of the plaintiffs, there were grooves cut perpendicularly from the coping stone to the bottom of the canal on either side, and, pursuant to the manager's orders, planks were put edgeways in these grooves from the coping stone to the bottom of the canal. The top plank reached to the top of the coping stone, which is some distance above the ordinary level of the water in the canal.

10. The overflow of water from the river still continued to increase, until it flowed over and finally through the canal fence and bank, and, crossing the towing-path, found its way into the canal. The water in the canal shortly afterwards rose to a point higher than the planks, and flowed over them in the direction of the defendants' warehouses.

11. The water in the canal afterwards rose still higher, and flooded the plaintiffs' mill through openings therein, doing the damage complained of.

12. It is to be taken as a fact, for the purpose of the argument only, that the insertion of the planks, by banking up the water, caused it to rise higher in the plaintiffs' premises than it other-



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wise would have done, and thereby occasioned them substantial damage.

A rule having been obtained,

*Holker, S.G.*, and *Edwards, Q.C.*, for the defendants, appeared to shew cause ; but the Court called on

*Herschell, Q.C.*, *Baylis*, and *A. Dicey*, to support the rule. If this had been a natural watercourse there can be no doubt that the defendants could not have closed it ; water that has once come into a watercourse by natural causes must be allowed to escape by the natural channel. And the rule is the same with respect to a canal ; assuming the owners were not bound to receive the water, and might have kept it out of the canal without being liable to any one, yet having admitted it, they were bound to let it flow down without obstruction. To that extent, at least, the plaintiffs, whose premises were situated by the side of the canal, were entitled to a benefit corresponding to the burden which the neighbourhood of the canal, legalised by statute, put them under. But, independently of this, the defendants are liable on the ground that they have thrown the water on the plaintiffs' premises. There is no authority that—except in the case of the sea, which is to such an extent a common enemy that the man who embanks against it may be said to be acting for the public : *Rex v. Pagham Commissioners* (1), and in the case where life or person is at stake—any person is entitled to avert from himself, so as to throw upon another, a threatened mischief arising from natural and physical causes. [They cited *Rex v. Trafford* (2) ; *Menzies v. Earl of Breadalbane* (3) ; *Bickett v. Morris*. (4)]

BRAMWELL, B. This rule must be discharged, on the ground that, except in defending themselves against the water, the defendants had nothing to do with bringing the water to the place where it did the injury complained of. If, instead of a canal, there had been a railway or a carriage road, the mischief would have been the same ; and I can see nothing in the argument that the plaintiffs were entitled to the benefit of the canal being there,

(1) 8 B. & C. 355.

(2) 1 B. & Ad. 874 ; 8 Bing. 204.

(3) 3 Bli. (N.S.) 414.

(4) Law Rep. 1 H. L. Sc. 47.

for the only benefit they were entitled to was that which corresponded with the servitude, that is, the right not to be injured by the defendants bringing water there without giving it a sufficient means of escape. Thus, if a feeder which ordinarily lets in so many gallons of water, should, in consequence of a violent flood, let in ten times as much, the defendants must provide for its escape, for they have brought the water there. Here, however, they have in no sense brought the water there.

But it has been argued that the defendants had no right to defend themselves against the flood. That is an argument which I cannot understand; the flood is a common enemy against which every man has a right to defend himself. And it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest some neighbour might say "You have caused me an injury." The law allows what I may term a kind of reasonable selfishness in such matters; it says, "Let every one look out for himself and protect his own interest," and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, "Why did not you do the same?" I think what is said in *Menzies v. Earl of Breadalbane* (1) is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water, no one has a right for his own purposes to diminish it, and if he does so he is, with some qualification perhaps, liable to any one who is injured by his act, no matter where the water which does the mischief came into the watercourse. I say with some qualification, because it may be that, even in the case of a natural watercourse, the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water. But it is not necessary to go further into that question, for here there was no right to an outlet for water. It might be a question whether the defendants could lawfully fill up the canal, which is a public highway; but setting that aside, which is not a matter the plaintiffs could complain of by action, could they have complained if, instead of a barricade, the defendants had put up a wall? No;

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(1) 3 Bl. (N.S.) 414.

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and the only difference is, that that would be a permanent obstacle and this is a temporary one.

Therefore, on the ground that the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes, that is, by a heavy fall of rain, and the overflowing of the river, and the configuration of the country, the defendants had the right to protect themselves against it, and the plaintiffs cannot complain although what the defendants did in so protecting themselves augmented the damage to them.

FIGOTT, B. I am of the same opinion. I read the 8th paragraph as admitting that the apprehension under which the canal keeper acted was a reasonable apprehension of damage to the defendants' warehouses. Reading it in that sense, what the defendants did was no more than if they had placed boards against the windows of their warehouses. Instead of that they put the boards across the canal so as to prevent more water than the canal could hold from flowing down it. They have not interfered with any natural flow of water, nor with the stream of the river; they have only adopted precautions to defend their property against what may be described as the extraordinary casualty of a great flood breaking into the canal. I can see no authority which forbids a man from protecting his property in this way. In *Menzies v. Earl of Breadalbane* (1), the Lord-Chancellor, after quoting two passages from the Digest (lib. 39, tit. 3), and referring to other passages which he describes as appearing to have a contrary tendency, says of the latter passages, "Or consider the subject in this light, that those passages to which I am now alluding have reference to accidental and extraordinary casualties from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of such self-preservation, guard themselves against the consequences; perhaps in this way the different passages in the Digest may be reconciled." The Lord Chancellor in these words seems to adopt as a proper rule of law the principle that a man should be per-

(1) 3 Bli. (N.S.) 414, at p. 420.

mitted to protect himself in this way against sudden and extraordinary casualties. The defendants have done no more, and the plaintiffs cannot therefore maintain any action against them.

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AMPHLETT, B. I am of the same opinion. I think the analogy between a canal and a natural stream is a false one. You cannot obstruct a natural stream, because the riparian proprietors above and below have a right to the use of the watercourse, and no one has a right to build across or upon the bed of the stream for any purpose. But this canal is not a natural outlet for water, nor had the plaintiffs any right to its use as such; and the plaintiffs cannot succeed, unless it can be shown that the canal, through what was done by the defendants, did bring a larger amount of water on to the plaintiffs' premises than would have gone there if the canal had never been made, or had been previously filled up. Therefore, in order to see whether the defendants are liable, we must look at all the acts done by them, beginning from the making of the canal and ending with the flood on the plaintiffs' premises. Did, then, the defendants bring more water than would naturally have come there, and was the outlet of the water obstructed by their acts? Now the canal was not in any way fed by the river, but the water of the river got into the canal, and if it had not got into the canal at all, exactly as much water from the river would by the natural configuration of the land have flowed down to the plaintiffs' premises. Therefore, on that part of the case, it appears that no more water came on to the plaintiffs' premises through the canal than would have come there otherwise. Then would the water have found an easier outlet if the defendants had never made the canal, and had never put the planks across it? I say, if they had never made the canal, because the plaintiffs cannot complain that they would have had a better outlet if the canal had been made, and the planks not put there. Now, so far from the canal penning or backing up the water, it provided an outlet more convenient than the natural outlet, even after the planks had been put across it; because, from the configuration of the ground, the water could not have flowed away so easily if the canal had not been cut there. Therefore I cannot see any damage for which the defendants are liable; and, without



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going into the cases as to the right to protect oneself against a common enemy, which is a point that does not really arise here, I think the rule must be discharged, on the ground that what was done by the defendants was not the cause of any mischief to the plaintiffs.

*Rule discharged.*

Attorneys for plaintiffs: *Phelps & Sidgwick, for Sale & Co., Manchester.*

Attorney for defendants: *R. F. Roberts.*

Nov. 12.

ELLIS AND OTHERS v. WILMOT.

*Principal and Surety—Liquidation by Arrangement—Bankruptcy Act, 1869, s. 125—Effect of absolute Discharge of principal Debtor.*

Where a principal debtor is discharged by a resolution under s. 125 of the Bankruptcy Act, 1869, his surety remains liable in the same manner as in an ordinary bankruptcy, although the resolution contains no reservation of rights against sureties.

SPECIAL case stated without pleadings for the opinion of the Court on the following facts:—

Prior to October, 1869, Etheridge carried on business as a jeweller in Norwich, in partnership with the executors of Ellis. In that month a dissolution was agreed upon, one of the terms being that Etheridge should take to the business, and, amongst other things, give security for the payment of 7000*l.* to the executors. A joint and several bond was accordingly executed by Etheridge, and by the defendant and others as sureties, to pay 7000*l.* by fourteen half-yearly instalments of 500*l.* each. The defendant's liability, however, was limited to 1300*l.* Two instalments were paid in full by Etheridge before the 6th of April, 1871, when he filed a petition for liquidation under the Bankruptcy Act, 1869, s. 125. At a general meeting duly held under that section the requisite majority of his creditors resolved that his affairs should be liquidated by arrangement, and a trustee was appointed. Everything necessary to be done was done to make the proceedings binding upon all the creditors. In April, 1871, the plaintiffs

proved against the estate for 6020*l.* 11*s.*, which was the whole amount remaining due to them on the bond for principal and interest. The estate paid a dividend of 9*s.* 2*d.* in the pound, which the plaintiffs received upon the amount of their proof.

On the 5th of August, 1872, a resolution, to which the plaintiffs were parties, was duly passed by the statutory majority, granting the discharge of Etheridge; and this discharge was afterwards certified and reported to the registrar, who gave his certificate of the discharge in accordance with the provisions of the Bankruptcy Act, 1869, s. 125. The defendant was not an assenting party to the resolution, nor did he prove against the estate on account of his liability under the bond. The plaintiffs in this action, which was brought when five instalments were due, sought to recover from the defendant the amount due from him on the bond, but upon the argument they limited their claim to 405*l.* 11*s.*, the amount admitted to be due, if anything was due, at the date of of the writ, having regard to the fact that his liability was limited to 1300*l.*, and that the plaintiffs had received a dividend of 9*s.* 2*d.* in the pound from the principal debtor.

The question for the opinion of the Court was whether the plaintiffs were entitled to recover. (1)

Nov. 11. *Manisty, Q.C.* (*Petheram* with him), for the plaintiffs, cited *Browne v. Carr*. (2)

[He was stopped.]

*Prentice, Q.C.* (*Gould* with him), for the defendant. The debtor's discharge under s. 125 of the Bankruptcy Act, 1869, to which the plaintiffs were assenting parties, discharges the surety. Under s. 126, there is no doubt that this would be so: *Wilson v. Lloyd* (3); and the reasoning of that case applies here. Both under s. 125 and s. 126 the proceedings are the voluntary acts of the parties, and this distinguishes liquidation by arrangement and composition from an ordinary bankruptcy. In deeds of

(1) A question was also raised for the opinion of the Court as to the mode in which the amount, if any, recoverable by the plaintiff, was to be calculated, but it was not discussed, the plaintiffs being content in the

present action to have judgment for 405*l.* 11*s.*, the minimum sum to which at the issue of the writ they were entitled, if entitled at all.

(2) 7 Bing. 508.

(3) Law Rep. 16 Eq. 60.

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arrangement under the Bankruptcy Act, 1861, a release of the debtor discharged the surety, unless rights against him were expressly reserved: *Bateson v. Gosling* (1); *Cragoe v. Jones* (2): and the principle of the decisions on the construction of those deeds is applicable to liquidation by arrangement, which is just as much a voluntary act as entering into a composition deed. The language of s. 125, subs. 10, is not decisive. It should be limited to the effect of the discharge upon the debtor himself. Again, the form of discharge under s. 125 (form 122) appears to indicate that it might, if the creditors pleased, be conditional, there being a blank space for the insertion of conditions. *Megrath v. Gray* (3) is no authority for the plaintiffs. That case did not in any way deal with the position of a surety, and only decided that a joint debtor was not released by the discharge of his co-debtor (see s. 50 of the Bankruptcy Act, 1869).

*Manisty, Q.C.*, in reply.

Nov. 12. KELLY, C.B. I am of opinion that the plaintiffs are entitled to our judgment and to issue execution for 405*l.* 11*s.* The action was on a joint and several bond to pay 7000*l.* by fourteen half-yearly instalments of 500*l.* The defendant is one of the obligors, and executed the bond as a surety only and with a limitation of his liability to the extent of 1300*l.* At the time of action brought seven instalments had become due. Two had been paid in full, and therefore, were it not for the limitation I have referred to and to the proceedings on liquidation, the effect of which is the main question in the case, the defendant would be liable to pay 2500*l.* The plaintiffs, however, who have received a dividend of 9*s.* 2*d.* in the pound under the liquidation, limit their present demand to the sum of 405*l.* 11*s.*

Now, it is said by the defendant that the plaintiffs have lost their right to proceed against him by reason of their having consented to the principal debtor being discharged under a liquidation of his affairs by arrangement under the Bankruptcy Act, 1869, s. 125. But I think that although they were parties to the resolution discharging the principal, their remedy against the

(1) Law Rep. 7 C. P. 9.

(2) Law Rep. 8 Ex. 81.

(3) Law Rep. 9 C. P. 216.

surety is unaffected, just as it would have been unaffected by the debtor's discharge in bankruptcy. In the latter case the surety would still remain liable upon the grounds mentioned in *Browne v. Carr* (1), a case which is of undisputed authority. But the defendant contends that a discharge under s. 125 is different from an ordinary discharge in bankruptcy, and relies upon various cases, and especially upon a recent case in this Court, where a discharge of a principal debtor under the terms of a composition deed has been held to discharge the surety also, remedies against him not being expressly reserved. I will refer to these cases and to the principle upon which they proceeded more in detail presently, but will first consider the question before us with reference to the provisions of the Bankruptcy Act itself. Section 125 enables the affairs of a debtor to be liquidated by arrangement. It provides that a meeting of creditors is to take place and resolutions to be passed. The debtor is to be present and to answer all questions put to him, and in fact to do all that a debtor would be bound to do in the case of an ordinary bankruptcy. His property is to be surrendered to a trustee for the benefit of his creditors, and is to be distributed in all respects as though there had been a bankruptcy. Then the 7th subsection enacts that "the trustee under a liquidation shall have the same powers and perform the same duties as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in bankruptcy, and all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs were under liquidation, and the word 'bankruptcy' included liquidation by arrangement." Then follows another subsection giving the creditors power to choose the bank into which the trustee is to pay monies, and afterwards by subs. 9 the mode in which the debtor is to be discharged is prescribed in these words: "The provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the controller shall not apply in the case of a debtor whose affairs are under liquidation by arrangement, but the close of the liquidation may be fixed, and the discharge of the

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debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution at such time and in such manner and upon such terms and conditions as the creditors think fit." The mode of proceeding, therefore, is different; namely, by special resolution simply, instead of, as in sect. 48, either upon payment of a dividend of 10s. in the pound or upon a resolution to the effect that the bankrupt is not responsible for his inability to pay that amount, but there is no other difference, for subs. 10 enacts that the trustee shall report the discharge of the debtor, "and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this Act."

Now neither in bankruptcy nor in liquidation proceedings is it made absolutely compulsory upon the Court to grant an order of discharge, although, unless some very exceptional cause exists, a bankrupt who had paid 10s. in the pound, or whose creditors had passed a resolution to the effect that he was not responsible for its non-payment and that they desired his discharge notwithstanding, would no doubt receive his discharge. But in the latter case the discharge in bankruptcy would be the voluntary act of the creditors just as much as it is when they pass the resolution under s. 125; and I can assign no reason why in one case the surety should remain liable, and in the other is to be free from liability.

It is further contended that there is no distinction between the case of proceedings by way of liquidation under s. 125 and of proceedings by way of composition under s. 126. But when s. 126 is examined it is manifest that there is an essential distinction. There is no provision similar to that contained in subs. 10, that a discharge under a composition shall have the same effect as a discharge in bankruptcy; and the omission was no doubt made advisedly. The composition proceedings are entirely the act of the parties themselves, and they differ from either bankruptcy or liquidation by arrangement in this, that the debtor in case of a composition may be left in possession of his property, or one creditor might hold a great part of it. It is not surrendered to a trustee for the benefit of all his creditors, and thus the surety, if

he could be sued by a creditor, might find himself without any means of indemnifying himself against the demand. The principle laid down in *Browne v. Carr* (1) has no application, therefore, to a composition deed or a composition resolution. That case was one of a discharge in bankruptcy effected under the then bankrupt laws by a certain number of creditors signing the debtor's certificate—a perfectly voluntary act on their part—and yet it was held that the sureties were not discharged. In delivering judgment, Tindal, C.J., says (2): “The ground upon which it has been contended that this proceeding amounts to a release is the generally acknowledged principle that wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged;” and he gives as an instance the case of a creditor, without the surety's consent, agreeing to postpone the day for paying a debt, and also another illustration. He then proceeds: “In these and in all similar cases, however, the act done by the creditor is his own act, over which the surety has no control, and the injury which the surety would receive is one which he has no mode of preventing. But in the present case neither of these circumstances occur. The legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor where the creditor has proved or may prove himself where the creditor shall not have proved under the commission. It is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing of the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an act done by the creditor which altered the surety's right without his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time and prevented the creditor from proving, and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be assumed to have assented to the act.” This language applies exactly to the present case, for here, as in an ordinary bankruptcy, the surety might have paid the debt and proved under the liquidation. By paying the creditor he might have acquired all the creditors' rights; but he failed to pay, and it cannot therefore be said that the

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(1) 7 Bing. 508.

(2) 7 Bing. at p. 514, 515.

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discharge of the debtor by the creditor was a voluntary act by the creditor which he had no power to prevent. But, further, Tindal, C.J., thus expresses himself (1): "The signing of the certificate, where the creditor is satisfied that the bankrupt has conformed to the provisions of the statute, is a moral obligation on the creditor; it is a power vested in him by the Act which he is morally bound to exercise where the truth of the case requires it." The same remark applies to a liquidation where, as in bankruptcy, the debtor parts with his whole property and conforms to the provisions of the statute, and conducts himself unimpeachably. The creditors in such a case are morally bound to release the debtor, and they do not by so doing discharge the surety.

Two arguments, however, remain to be noticed. It is said that the form given in the schedule for a discharge under a liquidation shews that the discharge may be made conditionally, and therefore it is argued that, because the discharge in this case is not expressed to be with a reservation of rights against the sureties, therefore the sureties are discharged. That is a strange construction to put upon the form; to say, that because there is a blank space it must be filled in a particular manner, or else that the sureties are discharged. The blank space is probably left to be filled in, if necessary, by specifying certain acts which the bankrupt might properly be called on to do—to execute deeds or powers, for example—before his discharge was absolutely given to him. I cannot conceive that it in any way can affect the rights or liabilities of the surety.

Lastly, the case of *Cragoe v. Jones* (2) was relied on by the defendant; but that decision turned on the language of a composition deed, by which the parties had agreed between themselves that the debtor should be discharged in like manner as though he had been adjudged bankrupt and received his discharge in bankruptcy. This was their own language, and as they had not expressly agreed that the surety should remain liable, he was held to be released also. The case has no application here, where the law itself pronounces that the surety's liability remains. For these reasons, therefore, I think that the plaintiff is entitled to judgment.

CLEASBY, B. I am of the same opinion. The general question

(1) 7 Bing. at p. 516.

(2) Law Rep. 8 Ex. 81.

is as to the effect of liquidation on the position of the surety of the person liquidating, and we have to consider whether a discharge under a liquidation is to be regarded as a voluntary act of the parties. We are not dealing with a deed of composition or with a deed of arrangement under the previous bankruptcy law. The effect of a deed of arrangement has been much considered in the case of *Bateson v. Gosling*. (1) In that case the debtor had made over the whole of his property to the trustee, but the deed of arrangement contained a clause of release reserving expressly the rights against the sureties; and the effect of the decision is, that if the deed of arrangement had resulted in an absolute discharge of the principal debtor, then, following the judgment of Vice-Chancellor Wood in *Webb v. Hewitt* (2), it would have operated so as to discharge the surety altogether; but that, where the deed contains a clause reserving all the rights of the surety, it has not that operation. However, we are not now dealing with the effect of a deed of arrangement, but with the question, whether a resolution in liquidation can be considered a voluntary act of the creditors as regards the principal debtor. We have to consider whether they can be regarded in the present case as having by their voluntary act altered the position of the surety or discharged the principal debtor.

Now the 125th section itself does not throw much light upon what the nature of that act is; but when we refer to the rules (and especially rules 252 and 256), which are made part of the Act of Parliament, we find in reality that liquidation by arrangement is a proceeding in the Court of Bankruptcy, and that although the debtor is the person to move in the first instance, yet he moves with the assistance of the Court of Bankruptcy. By the direction and the assistance of the Court, therefore, proceedings are taken by which the creditors are summoned, and they are to meet together forthwith upon a matter which is to be submitted to them. What is the position of a creditor who attends that meeting—a meeting in the result of which various persons as well as himself are interested, at which a particular question is to be considered, debated, and submitted to the whole body, and at which he votes for this or that particular proposition?

(1) Law Rep. 7 C. P. 9.

(2) 3 K. & J. 438.

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In my opinion he is not a volunteer, nor is his act to be regarded as a voluntary act so as to compromise any right of his, except so far as that act involves particular consequences, which are distinctly provided for in the statute. It seems to me—and it is in this view that the authority of *Browne v. Carr* (1) is important—that whether we regard the act by which he votes in favour of liquidation, or whether we regard the act by which he votes in favour of discharge, the same character is to be attributed to that act. It is not to be regarded in any manner as an act compromising his rights, because he voluntarily does it. It is worth notice that all the forms connected with this 125th section are headed “In the London Court of Bankruptcy,” and the creditor finds himself summoned by the Court, as it were, to attend. That is the real foundation of the decision which I have to give, that this is not to be regarded in consequence of the way in which it is done as a voluntary act of the creditor so as to compromise his rights.

With reference to what has been said as to the form of discharge and as to there being a possibility of a discharge on particular conditions, there is no doubt that the Act, or rather Rule 302, which is a part of the Act, contemplates a discharge with or without conditions, but in my opinion this makes no difference whatever, as far as the surety's liability is concerned.

AMPHLETT, B. I am of the same opinion. With regard to the point of law respecting the discharge of the surety, the case has been so fully gone into by my Lord and my learned Brother Cleasby, that I shall avoid taking up the time of the Court by any lengthened observations.

We start with this admitted fact, which cannot be disputed, that in bankruptcy proper the surety is not discharged by the release of the bankrupt. And the only question is, whether there are any reasons in or out of the Act that would lead the Court to put a different construction upon the release of a bankrupt under liquidation. Now the proceedings under the 125th and 126th sections are really proceedings in bankruptcy. They have been recently very much considered by the Court of Common Pleas in the case of

(1) 7 Bing. 508.

*Megrath v. Gray* (1), where the Court came to the conclusion that proceedings, not only under the 125th, but also under the 126th section, were proceedings in bankruptcy, and being proceedings in bankruptcy, would be governed by the 49th and 50th sections of the Bankruptcy Act. The 50th section is this: "The order of discharge shall not release any person who at the date of the order of adjudication was a partner with the bankrupt, or was jointly bound, or had made any joint contract with him." Consequently that decision of the Court of Common Pleas would go some way to shew that even in the case of a composition under the 126th section the liability of the surety would remain, for the Court held there that the 50th section, to which I have alluded, would govern a case under the 126th section. However this may be, there can be, I think, no sort of doubt that proceedings under the 125th section are proceedings in bankruptcy, and then I can see no reason why the 50th section should not apply.

Something has been said about the hardship on the surety, and it has been asked, what was he to do? It appears to me his course was perfectly plain. He was surety to the extent of 1300*l.*, and if he did not wish to be bound by the proceedings of the creditors, and the debt had not been proved, he might have paid the 1300*l.*, and then proved for that sum; or if the principal debt had been proved, he might have applied to reduce the proof. In either case he had it in his power to take what proceedings he thought most to his interest in the bankruptcy.

Further, I agree with my Lord and my learned Brother that there is no reason why the rule in bankruptcy proper should not be applied in this case, because it has been shewn that in a liquidation the bankrupt parts with the whole of his property and vests it in the trustee, just as in a bankruptcy.

The case of *Wilson v. Lloyd* (2) has been cited; but that was a decision under the 126th section, although the head-note to the case does not clearly state the fact, and the learned judge in giving judgment expressed no opinion as to whether a resolution passed under the 125th section would have the effect which no doubt he did attribute to a resolution passed under the 126th section. *Wilson v. Lloyd* (2) is a strong authority to shew that under

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the 126th section there would not be a reservation of rights against the surety, but is no authority that proceedings under the 125th section would have that effect. If the question should ever arise under the 126th section, it would have to be considered whether the decision in *Wilson v. Lloyd* (1) is consistent with the judgment of the Court of Common Pleas in the case of *Megrath v. Gray*. (2) As far as I am concerned, I do not wish to express any opinion as to what would be the effect in this respect of proceedings under the 126th section.

*Judgment for the plaintiffs.*

Attorneys for plaintiffs: *Jones, Blaxland, & Son, for John Miller, Bristol.*

Attorneys for defendant: *Deane, Chubb, & Son, for C. H. Edwards, Birmingham.*

Nov. 20.

THE ATTORNEY GENERAL v. ALEXANDER AND OTHERS.

*Income Tax*—"Person residing within the United Kingdom"—*Foreign Corporation*—16 & 17 Vict. c. 34, s. 2, sch. D.

The Imperial Ottoman Bank was a corporation created by Turkish law. Its seat was fixed, by the concession and the statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the state bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the state a subsidy on account of the public business transacted by it.

On its creation it took over and continued to carry on the business of an English bank in London; and since its creation in 1863, the annual meetings of shareholders had always been held, and dividends declared, in London, though by its statutes the annual meetings might be held at any place which the committee of management might fix:—

*Held*, that the bank was not liable to be assessed to income tax in respect of its whole profits, as a "person residing within the United Kingdom" under the 1st clause of schedule D to s. 2 of 16 & 17 Vict. c. 34; but was liable only in respect of the profits arising from its business carried on in England, under the 2nd clause of the schedule.

CASE stated under 22 & 23 Vict. c. 21, s. 10, in a proceeding brought by the Attorney General against the defendants, who were agents in England for the Imperial Ottoman Bank, for a

(1) Law Rep. 16 Eq. 60.

(2) Law Rep. 9 C. P. 216.

penalty of 50*l.*, under s. 55 of 5 & 6 Vict. c. 35, for neglecting to deliver in a proper return of profits under the Income Tax Acts, of which the material sections are to the following effect:—

By schedule D to the 2nd section of 16 & 17 Vict. c. 34, duties are granted to the Crown (inter alia) “For and in respect of the annual profits or gains arising or accruing to *any person residing* within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be carried on in the United Kingdom or elsewhere.

“And for and in respect of the annual profits or gains arising or accruing to any *person* whatever, whether a subject of Her Majesty or not, *although not resident* within the United Kingdom, from any . . . profession, trade, employment, or vocation exercised within the United Kingdom;” and by s. 5 the duties imposed by that Act are directed to be assessed under the regulations of 5 & 6 Vict. c. 35, and the Acts therein mentioned or referred to.

By 5 & 6 Vict. c. 35, s. 40, it is enacted that “all bodies politic, corporate or collegiate, companies, fraternities, fellowships or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with,” and that certain officers of such corporations, &c., shall be answerable for doing such acts as the Act requires in order to the assessment of such bodies corporate, &c., to the duties granted by the Act, and paying the same; which acts include, under another section of the statute (s. 54), the making a return for the purpose of assessment.

By s. 42, “Any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of any trustee, &c., or of any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof;” and such trustees, &c., are made answerable for the doing of all acts required by the Act in order to the assessment of such persons to the duties granted by the Act, and paying the same.

By s. 100, the duties granted by s. 1, schedule D (corresponding with schedule D to the 2nd section of 16 & 17 Vict. c. 34), are

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directed to be assessed under certain rules, and rule 2 under the First Case in the section provides that "the said duty shall extend to every person, body politic or corporate, fraternity, fellowship, company, or society, and to every art, mystery, adventure, or concern carried on by them respectively in Great Britain or elsewhere."

By s. 106, "Every person engaged in any trade, manufacture, adventure, or concern, shall be chargeable by the respective commissioners acting for the parish or place where such trade, &c., shall be carried on, &c., whether such trade, &c., shall be carried on, &c., wholly or in part only in Great Britain."

By 5 & 6 Vict. c. 80, s. 2, "All persons intrusted with the payment of annuities, or any dividends or shares of annuities, payable out of the revenue of any foreign state to any persons, corporations, companies, or societies in Great Britain, or acting therein as agents, or in any other character," are to make a return of the same as therein mentioned, and are to pay the duty on such annuities, &c., out of the monies in their hands, on behalf of the persons entitled to the same; and by 16 & 17 Vict. c. 34, s. 10, these provisions are extended to "all interest, dividends, or other annual payments payable out of or in respect of the stocks, funds, or shares of any foreign company, society, adventure, or concern," and intrusted to persons in the United Kingdom for payment.

By various subsequent Acts the duties granted by 16 & 17 Vict. c. 34 were continued; the Act imposing the duty for the year 1871 being 34 & 35 Vict. c. 21.

The facts as to the constitution and business of the Imperial Ottoman Bank were stated in the following paragraphs of the case:—

16. Towards the close of the year 1862 the Ottoman Bank of London, which was a banking company established and carrying on business in London, arranged to transfer its business to the Imperial Ottoman Bank, which was a Turkish corporation incorporated according to the laws of Turkey by a firman of the Sultan.

17. The transfer of the business was completed in the beginning of the year 1863, by the issue of shares in the capital of the Imperial Ottoman Bank to the amount of 250,000*l.* (part of the total capital of 2,700,000*l.*) to the shareholders of the Ottoman Bank of London, and the business in London of the Imperial Ottoman Bank as

bankers was then commenced in London, under the management of the London members of the committee hereinafter referred to, in the premises theretofore occupied by the Ottoman Bank of London. The remainder of the capital was subscribed in Constantinople, Paris, London, and other places. Immediately on the formation of the Imperial Ottoman Bank, preparations were made to commence business in Constantinople, and it actually commenced business there on the 1st of June, 1863.

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18. The affairs of the Imperial Ottoman Bank were then, and have ever since continued to be, regulated by a concession from the Government of Turkey and certain statutes. (1)

19. By the concession the bank is established as a state bank for the Ottoman Empire. It is made subject to the general laws of the Empire, and its seat is fixed at Constantinople, with power to establish branches and agencies at other places.

20. The concession provides that the Ottoman government shall exercise its control over the bank by means of a high commissioner chosen by the government, who has the right to take cognisance of its operations, though without power to interfere in its administration, and who is to see to the faithful execution of the statutes. It further provides that the bank shall be administered at Constantinople by a board of two or three members, and a council of administrators of three members, both to be named by a committee chosen by the London and Paris founders, and this committee is to have power, in conformity with the statutes, to guide, control, and superintend the operations of the bank.

22. The concession grants to the bank, in addition to the right of carrying on the ordinary business of bankers, the exclusive privilege of issuing in Turkey notes payable to bearer on demand, payable at Constantinople or at the branches. These notes are made legal tender in certain parts of Turkey. They must be in the Turkish language, and must bear the seal of the high commission of the government.

23. The concession charges the bank at Constantinople with all the operations of the government treasury; that is to say, the receipt of all the revenues of the empire coming to the impe-

(1) A translation of the concession the material parts are stated in the and statutes accompanied the case; following paragraphs.

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rial treasury at Constantinople, and the payment of all drafts issued upon it by the minister of finance. The bank may further be charged at certain branches in Turkey with the receipt of the provincial revenues. For these services the concession provides that the bank is to receive a fixed annual payment of 20,000*l*.

24. The concession specially charges the bank with the payment of interest upon, and the redemption of the Public Interior Debt, and with the transmission of funds for the payment of interest and redemption of the Exterior Debt, for which it is provided that the bank shall receive a commission at a fixed rate of 1 per cent.

25. The concession further constitutes the bank the recognised financial agent of the government both at home and abroad, and charges it with all operations concerning the withdrawal from circulation of the *beschliks*, a kind of paper money then in circulation.

26. By the statutes above referred to it is declared that the bank is formed for the purpose of carrying into effect the privilege of the bank as defined in the concession, and the operations to be undertaken are defined in accordance with the concession. By the statutes the seat of the bank was fixed at Constantinople, where, accordingly, as already stated, in or about the month of June, 1863, and some months after the commencement of its business in London, the bank commenced business. By the same statute the bank was authorized to establish such branches and agencies as it should think fit.

27. By the statutes the administration of the bank in Constantinople is confided to a director-general, one or two assistant directors, and a council of administration of three members. These are appointed by a committee of from twenty to twenty-five members, of whom ten at least must be English or resident in England, and ten at least French or resident in France. This committee has the general guidance, control, and superintendence of the operations of the bank, and its members are elected by the general meeting of shareholders. The statutes further require that the committee shall meet four times a year alternately in London and Paris, and the committee has, in fact, met and still does meet sometimes in London and sometimes in Paris. The execu-

tion of the decision of the committee, and the more immediate supervision of the affairs of the bank, is assigned under the statutes to a sub-committee (appointed by the general committee), consisting of eight members, of whom four are chosen from the English and four from the French section of the general committee.

28. It is provided by the statutes that the London members of the committee shall be charged, under the control of the sub-committee, with the management of the London agency of the bank; and since the early part of 1863, when the business of the bank in London commenced, until the present time, the London business of the bank, being the ordinary business of bankers, has been carried on under the management of the London members of the committee in premises in the city of London. The said last-mentioned persons have the receipt of all the gains and profits arising and accruing from the trade and business of the bank carried on within Great Britain.

29. It is provided by the statutes that the annual and extraordinary general meetings shall be held at such places as the committee shall fix; such meetings in fact have always been and still are held in London, and at such annual general meetings the report of the committee, with the accounts for the preceding year, are received, the dividends are declared, and members of the general committee are elected.

On the 3rd of April, 1872, the following return was made by the defendants on behalf of the bank:—"The London agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople, in the empire of Turkey. The said London agency consists of the following persons [here followed the names of the defendants]. The amount of profits and gains accruing to the said bank from the trade of bankers exercised within Great Britain, viz., at London, for the year ending 5th April, 1872, computed on a fair and just average of three years ending the 31st December, 1871, the last-mentioned day being the day on which the accounts of the said bank have been usually made up, and deducting the part on which income-tax has been already paid by deduction, is 40,000*l*. The London agency of the bank decline to make any return of the profits accruing to the bank from

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business carried on by the bank elsewhere than in the United Kingdom, being advised that such profits are not liable to income-tax."

The defendants also made a return under 16 & 17 Vict. c. 34, s. 10, of moneys intrusted to them for the payment of dividends upon shares of the bank to persons in the United Kingdom.

The Commissioners of Inland Revenue contended that the bank was bound to make a return of all its annual profits, whether made in the United Kingdom or not, and was chargeable thereon under Schedule D.

The question for the opinion of the Court was, whether the bank were bound to make a return of and were chargeable upon all its annual profits, whether made in the United Kingdom or elsewhere, or whether they were only bound to make a return of and were chargeable upon the profits made in the United Kingdom, and of so much of the profits made abroad as were remitted to this country for distribution in London.

*Sir R. Baggallay, A.G. (Holker, S.G., and Pinder with him), for the Crown.* The Imperial Ottoman Bank is a person "residing within the United Kingdom," within the meaning of the first clause of schedule D. If an individual resident in a popular sense in one country, that is, having there his private establishment where he lived and slept, had also establishments in other countries where he carried on business, not merely through agents, but directly by his clerks and servants, he would properly be said to reside wherever he so carried on business. Admitting that in the case of a natural person so carrying on business, he would only be liable to assessment on the whole of his profits if he were resident in the United Kingdom in the sense of living and sleeping there, the case is different with respect to a corporation, which cannot have a residence in the same sense as a natural person. Such a body has no locality except by its acts and must be said to reside where its substantial business is carried on. It was on this principle that in *Newby v. Colt's Patent Firearms Manufacturing Co.* (1) it was held that a foreign corporation so carrying on business in England could be served

(1) Law Rep. 7 Q. B. 293.

with process here. In the case of the Imperial Ottoman Bank a residence of this kind is clearly shewn. Not only is it the successor to an English corporation, the Ottoman Bank of London, and carries on the same banking business on the same premises, but it appears from its mode of carrying on its general business that London is its head quarters, the accounts being made up, the annual meetings held, and dividends declared here. The case of *Sulley v. Attorney General* (1) is not opposed to this view, for, in the first place, the decision there turned on the question, whether there was any trade carried on in the United Kingdom within the second clause of schedule D, as to which the Exchequer Chamber held that there was not; and, in the second place, the case related to a partnership of individuals residing in different countries, and not to the case of a corporation.

[KELLY, C.B. If carrying on business constitutes residence, what is the meaning of the words in the second clause of schedule D, "although not resident within the United Kingdom" ?]

The second clause, although applicable to natural persons, is not applicable to corporations, whose residence must be determined by their operations, or is only applicable where they do not carry on business directly.

*Matthews, Q.C.* (*Arthnr Wilson* with him), for the defendants. The words referred to by the Court are a conclusive argument against the construction contended for by the Crown; and it is further shewn by s. 39 of 5 & 6 Vict. c. 35, that the word "residence" is used in these Acts by the legislature in its ordinary sense. No such distinction as is suggested between a natural person and a corporation is drawn by the Act, which only taxes a corporation as a "person;" and, unless residence in the case of a corporation is something altogether different from residence in the case of a natural person, the case of *Sulley v. Attorney General* (1) is an authority for the defendants; for if the firm in question could have been treated as resident here on the ground of its carrying on business here, it would have been unnecessary to consider whether the case fell within the second clause of schedule D; it would have fallen within the first. But there is no difficulty in de-

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(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.

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termining what is the residence of a corporation. It resides in the place where its legal seat is, that is, in the country by virtue of whose laws it was created and exists. Its status may be and is recognized by the laws of other countries, so as to give effect to its transactions abroad, but its seat and residence can only be in the country where it is constituted. The position of a corporation beyond the limits of its own state has been frequently considered in the United States, where each state has the power of creating corporations, and in a series of decisions this view has always been taken: *Bank of Augusta v. Earle* (1); *Ohio and Mississippi Ry. Co. v. Wheeler* (2); *Baltimore and Ohio Ry. Co. v. Glenn* (3); *Blackstone Manufacturing Co. v. Inhabitants of Blackstone*. (4) The Imperial Ottoman Bank, therefore, being a Turkish corporation, and existing only by virtue of the law of Turkey, which fixed its seat at Constantinople, resides in Turkey, and in no other country. The case of *Newby v. Coll's Patent Firearms Manufacturing Co.* (5) has no bearing on the question of residence; the decision was, not that the defendants resided in England, but that their manager here was an officer who might be served with process. The question was one of jurisdiction, and jurisdiction does not depend on residence, but on the party served being within the territorial jurisdiction of the Court; there the party served, being within the jurisdiction, was held to be such a person as, in case of a corporation, is appointed by statute as the person to be served with process.

A case more nearly in point is *Kilkenny and Great Southern and Western Ry. Co. v. Feilden* (6), where it was held that an Irish corporation suing here must give security for costs, although the office of the company, where all its business was transacted, and all its property were in England, and four-fifths of its shareholders resided here. And in cases under the County Court Act, 9 & 10 Vict. c. 95, ss. 60, 128, where the question has arisen, whether a railway company resided or "dwelt" within a county court district, it has been always held that it "dwelt" at its

(1) 13 Peters, 519, 588, 589.

(2) 1 Black, 286, 295.

(3) 28 Maryland Rep. 287.

(4) 13 Gray (79 Mass. Rep.), 488.

(5) Law Rep. 7 Q. B. 293.

(6) 6 Ex. 81; 20 L. J. (Ex.) 141.

principal place of business only: *Adams v. Great Western Ry. Co.* (1); *Shiels v. Great Northern Ry. Co.* (2); *Brown v. London and North Western Ry. Co.* (3) If it becomes necessary to inquire where the real head-quarters of the Imperial Ottoman Bank were by reference to its operations, it can hardly be doubted that its principal operations are in Turkey, where it is a bank of issue, and is the state bank, and is charged with the collection of the revenue, and is subjected to the supervision of the government, and receives a subsidy from the state in respect of the public business transacted by it, while it acts in England only through its London agency. The proposition contended for by the Crown would lead to the practical absurdity and injustice, that a corporation which carried on business in several countries would be liable, under statutes similar to the Income Tax Act, to be taxed in respect of its whole profits in each country, in addition to the taxation imposed on dividends payable to the shareholders receiving payment through funds transmitted to this country.

*Holker, S.G.*, in reply.

KELLY, C.B. The question in this case is, whether the defendants, who represent a banking corporation called the Imperial Ottoman Bank, are liable to be assessed to the income tax in respect, not only of the profits realised by the branch or agency of the bank established in London, amounting to 40,000*l.*, as to which they admit their liability, but upon the whole profits of the corporation realised in England, France, Turkey, or elsewhere, which amount to no less than 278,395*l.*; and this question is, no doubt, one of great importance to the Imperial Ottoman Bank and other corporations similarly situate.

It is contended on behalf of the Crown that they are liable to be assessed in respect of the whole of their profits, on the ground that the corporation comes within the first clause of schedule D to 16 & 17 Vict. c. 34, s. 2, which provides that income tax shall be payable "for and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same

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(1) 6 H. & N. 404; 30 L. J. (Ex.) 124. (3) 4 B. & S. 326; 32 L. J. (Q.B.) 318.  
(2) 30 L. J. (Q.B.) 331.



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shall respectively be carried on in the United Kingdom or elsewhere"; and the question, therefore, is, whether this corporation, the Imperial Ottoman Bank, can be said, on the facts stated, to reside within the United Kingdom. Now, I am clearly of opinion that upon the case now before the Court, the Imperial Ottoman Bank cannot be said to be resident in this country; that the business carried on in London is a mere branch or agency, and not the bank itself; and that London is not the chief seat of carrying on the business of the bank. This is, I think, conclusively settled by the language of what we may term the charter of incorporation, that is, the convention relating to the concession, the 6th article of which is as follows: "The seat of the bank shall be at Constantinople; with the authority of the government it shall establish as many branch establishments and agencies as it may judge convenient"; in conformity with which the statutes of the bank provide, art. 4: "The society has its seat at Constantinople, it can establish as many branches and agencies as it may think fit." If, therefore, this corporation can be said to be resident anywhere, I am of opinion that it must be resident in Constantinople, where alone it has its "seat," under the express terms of its charter; and the branches or agencies, which it establishes in London, Paris, or elsewhere, are not the establishment, the bank itself, but only branches of that bank which has its seat at Constantinople.

Beyond the language of the concession, which is plain and clear enough, and cannot well admit of any other construction, it may be observed that the establishment in London is throughout alluded to in the case not as the chief seat of the society, or as the corporation itself, but as an agency. Thus, in the return made by the defendants it is stated (and there is nothing in the case to control or qualify the language used), "The London agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople, in the empire of Turkey"; so that the establishment in London is described and, having reference to the charter or concession, is correctly described as "the London agency" merely. I think, therefore, that we cannot hold that this is a corporation residing in the United Kingdom within the 1st clause in schedule D.

It is important to observe the distinction between the liability of a person and that of a corporation. If a person resided in London deriving profits from some business carried on either in the United Kingdom or elsewhere, he would be liable only for the profits which he himself personally acquired. If he had a banking house at London, another at Paris, and another at Constantinople, he would of course be entitled to the aggregate profits of the whole three, and would be liable to assessment in respect of the aggregate amount. But if he carried on business in this way in partnership he would be liable, not for the whole profits of the undertaking, but only for his share of the profits, whatever it might be. If, however, we were to hold this corporation to be a person residing in the United Kingdom, then the corporation, acquiring the whole aggregate profits, would be liable to assessment upon the aggregate amount.

If, then, this corporation is not within the 1st clause of schedule D, I do not think it is necessary to say more than that the 2nd clause is one which may well be held to provide for the case. Here, therefore, a branch establishment existing within the United Kingdom, and a profit to the extent of 40,000*l.* a year being realised at this branch, the corporation, as represented by the defendants, are liable to assessment on that amount, and no more.

CLEASBY, B. I am of the same opinion. The question arises upon the first branch of schedule D. The word "person" is used both in the first and the second branches; but we must recognise a corporation as coming within the meaning of the word "person" in both branches, because, by the 5 & 6 Vict. c. 35, s. 40, an officer is appointed to make the return in respect of a corporation, which return has been so made in the present case. It has not been contended—it cannot be said—that the whole business of the corporation is "carried on" in London. Some of the paragraphs of the case, indeed, shewing that the annual general meetings of shareholders have always been held in London, seem to point in that direction; but that proposition has not been contended for. Therefore we have to deal with this question merely upon the words "any person residing in the United Kingdom." Now, if re-

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sidence could not be predicated of a corporation, if the idea were not applicable to a corporation under this Act of Parliament, then, of course, the first branch of the schedule could not apply. The argument, however, is not put upon that ground; and we have to consider whether it is made out, not only that the word "person" is fulfilled by this body, which is a corporation, but whether the terms "residing within the United Kingdom" are also satisfied. Now, no doubt, in speaking of a corporation, which is a different thing from the persons composing it, there is a difficulty in dealing with the question of residence; but without defining the word "residence," which I should not attempt to do, there are in the Act certain clauses which limit its meaning, and give us some guide in considering whether a person does or does not come within the words "residing in the United Kingdom."

The learned counsel for the defendants has referred us to the case of *Sulley v. Attorney General* (1), as if it decided that a partnership which carried on a business in England could not be regarded as resident here. But, in point of fact, the case does not decide that, because what was held in that case was, that there was no business at all in England which was liable to income tax. I do not, therefore, regard that case as having any bearing on the present, in which undoubtedly business is carried on here.

But to what do the learned counsel for the Crown refer as shewing that this corporation can be regarded as residing in England? They refer to the various sections of the case, which shew that certain acts were done here; but, following the course taken by the Lord Chief Baron, it appears to me sufficient to say that, looking at the constitution of the Imperial Ottoman Bank, we can see it did not carry on business in England in such a sense that we should be justified in saying it resided here. The Ottoman Bank of London had undoubtedly carried on its business in England, and had resided here; but that bank transferred its business to the Imperial Ottoman Bank, which was quite a different institution; and when we refer to what it is, we find that it is established as the state bank for the Ottoman Empire, that its seat is fixed at Constantinople; that the concession grants to it, in addition to the right of carrying on the ordinary business of

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.

bankers, the exclusive privilege of issuing in Turkey notes payable to bearer on demand, payable at Constantinople or at the branches, which notes must be in the Turkish language and must bear the seal of the high commissioner of the government. Then the concession charges them with the receipt of all the revenues of the empire coming to the imperial treasury at Constantinople, and the payment of all drafts issued by the minister of finance; and, as a bank, they are to be paid in a particular way in respect of all these matters. It certainly appears to me that it would be most unreasonable to say that the bank, when it issued notes in the Turkish language constituting the currency of Turkey, could be regarded in any sense as carrying on its business in London; and in the same way it would be wholly unreasonable to regard a bank, the business of which was to receive all the revenues of the empire coming to the imperial treasury at Constantinople and to pay all drafts there for carrying on the government, as carrying on its business in London, so as to be regarded as resident there. This is really sufficient for my judgment in this case, which is, that it is not made out that the Imperial Ottoman Bank is resident in England, or is even carrying on its business here, although some of its business is carried on here; and the judgment of the Court must therefore be for the defendants.

AMPHLETT, B. I am of the same opinion. The question entirely depends on whether or not, under the circumstances of this case, the Imperial Ottoman Bank is a "person residing within the United Kingdom" within the meaning of this Act of Parliament. Now, the way in which the Attorney General first proposed to argue (though he afterwards very fairly retreated from that position) was this, that a person carrying on business in London or elsewhere might be said to reside where he was carrying on business; so that, if he had two or three establishments in different countries, he might be said to reside in any of these countries. But, on my putting to him whether, in the case of a person, say, for example, M. Lafitte, living in the ordinary sense only in Paris, but having an establishment in London carried on in his name by his agents, he could say that such a person could be regarded as residing in London as well as in Paris, so as to be chargeable

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with the whole of the profits which he made, not only in London, but in Paris, he said that he did not wish to carry his argument so high; and, indeed, this would be attended with such monstrous injustice that I was not surprised he did not insist on it. But if that is so—if an individual cannot be said to reside wherever he carries on his business, how can a foreign corporation be said to reside within the kingdom for no other reason than that it carries on business there? It must follow the same rule.

What, then, is the reasonable meaning of a corporation residing anywhere? It appears to me that it is this, that a corporation may be said to reside wherever it has its seat. Now, here, any one looking, not only at the language of the concession which establishes the bank abroad, but at the duties which it has to discharge, would, I think, hesitate to say that this bank, which exists only as a corporation in Turkey, and is not a corporation anywhere else, and which has its seat in Constantinople, resides in the United Kingdom. We should be putting a very great strain on language if we were to hold that because a foreign corporation is, not only in language but according to the facts, carrying on a branch business in London,—the main part of its business, and the most important part, being in Constantinople, where it is the Imperial Bank,—that corporation is residing as a corporation within the United Kingdom. For these reasons I think the first part of the question must be answered in the negative.

*Judgment for the defendants.*

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for defendants: *Bircham & Co.*

## [IN THE EXCHEQUER CHAMBER.]

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Dec. 2.

BAXENDALE AND OTHERS v. LONDON, CHATHAM, AND DOVER  
RAILWAY COMPANY.*Damages—Recovery of Costs of Litigation—Separate Contracts—Proximate Cause.*

H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into court, and disputed their liability as to the costs:—

*Held* (reversing the judgment of the Court below), that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants having been separate and independent. *Mors Le Blanch v. Wilson* (Law Rep. 8 C. P. 227) (Lush, J., dissenting) disapproved.

APPEAL from a decision of the Court of Exchequer, discharging a rule to enter a verdict for the defendants.

The facts of the case are as follows:—On the 6th of October, 1871, Robert Harding delivered to the plaintiffs, who are carriers and forwarding agents, a case containing two pictures for transmission to Paris; and at the same time his agents filled up and signed a foreign declaration and consignment note, in which the value of the pictures was stated to be 1000*l*. On the same day, the plaintiffs delivered the case to the defendants to be forwarded to their agents at Calais. A consignment note was signed by the plaintiffs, describing the goods as "one case pictures, value 1000*l*." This consignment note was subject to various conditions, exempting the defendants from liability in certain contingencies, which however did not happen. The case was forwarded by the defendants and reached Dover safely; but in course of shipment was, through the negligence of their servants, dropped into the sea and the pictures were damaged by sea water. The defendants having informed

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the plaintiffs of the accident, the plaintiffs on the 11th of October, wrote them as follows: "The senders of the goods have been to examine them, and state that the pictures are utterly spoiled and the amount given in the declaration does not near cover the value thereof, and a claim will be made. We are afraid you are not, under the circumstances, protected by the Carriers' Act for the damage done, and we shall be glad to know if you will accept the claim, or what you intend doing in the matter." The defendants, on the 24th, replied, declining all liability. On the 28th of November Harding made a claim of 1000*l.* on the plaintiffs, who refused to entertain it, on the ground that the pictures had not been insured in accordance with the Carriers Act. He thereupon commenced an action against them, and they wrote to the defendants on the 12th of December, informing them of the fact in these terms:—"A writ has now been issued: will you kindly inform us whether you will defend by your own solicitors, or if you wish us to do so on your account? It would be a great mistake to have two actions: one against us and then another against you." Not having received any answer, on the 15th of December the plaintiffs again wrote, "requesting instructions," and on the same day the defendants' attorney wrote:—"I am unable to give you any instructions, but must leave you to deal with the case as you think fit. I am not aware whether, when the case of pictures was delivered to you for carriage, a declaration was made and insurance paid. This company received it only as an ordinary parcel." On the 8th of January, 1872, declaration was delivered in *Harding v. Baxendale and Others*, and on the 13th of January the plaintiffs forwarded a copy of it to the defendants' attorney, again requesting the defendants to undertake the defence or, if not, to make any suggestion as to the defence which should be raised. They added, "The defendants will hold your clients responsible for the damages which the plaintiff may be held entitled to recover as well as for the costs which the defendants may incur to the plaintiff and to their own solicitor in defending the action." The defendants' attorney replied on the 16th of January, declining to offer any suggestions as to the defence of the action.

The plaintiffs continued to defend the action, although they received, whilst it was still pending, an opinion from their counsel

that the Carriers Act afforded no defence, and that they would not be successful.

They pleaded the general issue, liberty being given them by a consent order to raise, under this plea, the defence that they had received the goods as mere forwarding agents, and also that they were protected by the Carriers Act.

A part of the expenses incurred related to special defences set up by them and the remainder to the value of the pictures. Upon receiving notice of trial they again communicated with the defendants, who however continued to decline to make any suggestion as to the defence. The plaintiffs having delivered their briefs were again advised that the Carriers Act afforded no defence. They wrote on the 19th of June, 1872, to inform the defendants of the unfavourable opinion they had received, and asked whether they should endeavour to settle the action. The defendants' attorney replied, "I cannot, under the circumstances of the case, take any course implying assent on the part of the company to the settlement of the action, as they are prepared to defend any proceedings against them on the question of legal liability."

The cause of *Harding v. Baxendale and Others* was tried in November, 1872, and resulted in a verdict for the plaintiff for 650*l.* The plaintiffs' costs were taxed at 248*l.* 13*s.* 4*d.*, which, with the damages, the plaintiffs paid to Harding. The plaintiffs' own costs amounted to 260*l.* 4*s.* The present action was brought to recover from the defendants 650*l.* and the costs incurred by the plaintiffs in the defence of the former action. The defendants paid 650*l.* into court, and denied liability as to the costs.

The cause was tried at the Surrey spring assizes, 1873, before Cockburn, C.J., when the above facts were admitted and a verdict entered for the plaintiffs for the amount of the two bills of costs in addition to the 650*l.*, with leave to move to enter a verdict for the defendants, or to reduce the damages to an amount to be settled by the Master. A rule was afterwards obtained accordingly.

June 13, 1873. *Watkin Williams, Q.C.*, and *Murphy*, shewed cause. They relied on *Mors Le Blanch v. Wilson* (1) on the

(1) Law Rep. 8 C. P. 227.

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question of the plaintiffs' right to recover the costs. The plaintiffs took under the circumstances a reasonable course in defending the action. It was true they had been advised that the Carriers Act was no defence, but as they knew the defendants intended to rely upon it they were justified in setting it up. Moreover, they were bound to incur some expense in having the damages ascertained.

*Day, Q.C.*, and *W. G. Harrison*, supported the rule, and contended, first, that the contracts between the plaintiffs and Harding, and between the plaintiffs and defendants, being entirely distinct, the costs incurred in defending Harding's action could not be considered as in any sense the natural consequence of the defendants' breach of contract; and, secondly, that the plaintiffs had not taken a reasonable course under the circumstances.

*Cur. adv. vult.*

June 27. The judgment of the Court (Bramwell and Cleasby, BB.), was delivered by

CLEASBY, B. This was one of those cases in which a person incurs a responsibility in consequence of the neglect or default of another in some duty owing to him, and a question of some difficulty arises in it as to how far he can make that other responsible for costs he has incurred in defending an action brought against him.

It appears that the plaintiffs had received from Harding two pictures to be forwarded to Paris. They delivered them to the defendants, by whose negligence the pictures fell into the water and were damaged. A claim was then made against the plaintiffs by Harding, and an action brought by him against them. Now, in the first instance, the plaintiffs could obtain very little information to guide them, either in defending the action or in settling it. They could not pay money into Court, for the damage done by the water to the pictures was difficult to ascertain without a regular inquiry by persons competent to deal with the matter. Having regard to the nature of the claim, we certainly think they could not be expected either to settle the claim before action or to pay money into Court; and we think it was the necessary consequence of the defendants' neglect that the plaintiffs should be put to the expense of ascertaining in a proper way the amount of their

liability to Harding, in order that they might recover over against the defendants. So far, therefore, as regards the part of the rule which asks that the verdict should be entered for the defendants, we think it should be discharged; for clearly the plaintiffs were entitled to some costs.

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Then the question arises whether this was a case in which the plaintiffs acted fairly and reasonably in defending to the end the action brought against them by Harding; and in considering this question we think we ought to abide by the rule laid down, or rather, I should say, acted upon, in *Mors le Blanch v. Wilson* (1), according to which a jury are to give such costs as were reasonably incurred by the plaintiffs in the action brought against them, either in defending the action or otherwise ascertaining the amount of liability. I have already called attention to the nature of the case; I will proceed to consider the conduct of the present defendants in reference to the claim. As soon as it was made the now plaintiffs wrote to the defendants giving them notice, and asking for their advice and assistance. A long correspondence ensued, and eventually the defendants declined all liability in the matter, and left the plaintiffs to take their own course. Still the plaintiffs continue to urge the defendants to do something, and on the 12th of December write: "A writ has now been issued. Will you kindly inform us whether you will defend by your own solicitor, or if you wish us to do so on your account? It would be a great mistake to have two actions—one against us, and then another against you." Unfortunately this is what has taken place, but certainly through no fault of the plaintiffs. The defendants continued to keep them at arm's length, and insisted that, if necessary, they would avail themselves of the protection of the Carriers Act. The result is, that the plaintiffs did all they could to prevent two sets of costs from arising; and it appears to us that the fault having been that of the company, they might fairly and properly have taken on themselves the defence of the action brought by Harding. Instead of doing so, they left the plaintiffs to make the best of the case they could.

Under these circumstances, the result is that the plaintiffs are

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entitled to recover from the defendants all costs incurred in having the amount of their liability ascertained, and also all costs attributable to the defence raised under the Carriers Act. They are not entitled to the costs of any defence peculiar to themselves—such as that they were mere forwarding agents and not carriers. It is true that we think the defence, under the Carriers Act, could not be successfully set up; but still we are of opinion that it was quite justifiable on the plaintiffs' part, not only to have the amount of liability established by a jury, but also to put forward the Carriers Act as a ground of defence, as the defendants to the last insisted upon it. We cannot deal with the figures, but with the guide we have given, the parties ought to be able easily to settle the amount.

*Rule discharged.*

From this decision the defendants appealed.

Dec. 1, 2. *W. G. Harrison* (Day, Q.C., with him), for the defendants, contended that the costs incurred by the plaintiffs in *Harding v. Baxendale* were not the natural consequence of the defendants' act. The contracts between the plaintiffs and Harding and between the plaintiffs and defendants, were entirely distinct. [He was stopped.]

*W. Williams*, Q.C. (*Murphy*, Q.C., with him), for the plaintiffs. The plaintiffs were bound to incur some expense in ascertaining the real amount of their liability to Harding. They might, it is true, have let judgment go by default; but having regard to the defendants' conduct and insistence that the Carriers Act was a defence, they were not acting unreasonably or improperly in defending the action. The defendants throughout appear to have thought that the Carriers Act was a defence, probably on the ground that although a declaration of value was made no increased rate of charge was paid: see, however, *Behrens v. Great Northern Ry. Co.* (1) The costs incurred were, therefore, the legitimate consequence of the defendants' breach of duty; and the case of *Mors le Blanch v. Wilson* (2) is strictly applicable. There, as here, there were two contracts.

(1) 7 H. & N. 950; 31 L. J. (Ex.) 299.

(2) Law Rep. 8 C. P. 227.

[QUAIN, J. That case proceeded upon a dictum of Parke, B., in *Tindal v. Bell*. (1)]

The principle of the case is a sound one wherever a claim for unliquidated damages is preferred which requires investigation. He also cited *Rolph v. Crouch* (2); *Ogle v. Earl Vane* (3); Mayne on Damages, 2nd ed. by Lumley Smith, p. 43.

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LORD COLERIDGE, C.J. In this case a claim is made against the defendants for the costs incurred by the plaintiffs of an unsuccessful defence offered by them to an action brought against them by one Harding. It appears that the plaintiffs contracted with Harding to send two pictures for him from London to Paris; and that afterwards, by a separate and independent contract, the defendants agreed with the plaintiffs to carry the pictures. In the course of the transit, through the defendants' negligence, the pictures fell into the sea and were damaged. Harding thereupon brought an action against the plaintiffs, who took legal advice, and were told, and rightly told, that they had no defence. The plaintiffs communicated this fact to the defendants, and a long correspondence ensued, the substance of which was that the defendants said to the plaintiffs, "Take your own course in Harding's action. We will have nothing to do with it. When the time comes for you to attack us we shall defend ourselves." The plaintiffs, however, persisted in defending Harding's action, and it went to trial. The plaintiffs were defeated, and then commenced this action, in which they sought to recover from the defendants, not only the damages assessed by the jury as the value of the pictures, but also the costs of their unsuccessful defence. The defendants paid the damages for the injury to the pictures into Court, and denied any further liability. The Court of Exchequer have decided upon the authority of *Mors le Blanch v. Wilson* (4) that they are liable to those costs, or, at all events, to so much of them as were incurred by the plaintiffs in ascertaining the amount of their liability to Harding, and in relation to the defence of the Carriers Act. I am of opinion that this decision is

(1) 11 M. & W. 228, at p. 231.

(2) Law Rep. 3 Ex. 44.

(3) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.

(4) Law Rep. 8 C. P. 227.



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erroneous. The defence was not, in my judgment, a reasonable defence. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up.

This, however, does not dispose of the whole of the plaintiffs' claim. For it may be said "True, the defence was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default, upon a writ of inquiry. But I think this contention fails also, because it seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty. The judgment, therefore, must be reversed. It appears to have proceeded wholly upon the case of *Mors le Blanch v. Wilson* (1), which is certainly very like this case, and which, if necessary, should in my opinion be overruled.

KEATING, J. I am of the same opinion. I think the damages here sought to be recovered are too remote. The contract between Harding and the plaintiffs is wholly separate from that between the plaintiffs and defendants, and any costs incurred by the plaintiffs in defending an action by Harding on his contract cannot be regarded as the natural and proximate result of the defendants' breach of duty. A different question might have arisen supposing the defendants had requested the plaintiffs to defend, for in that case these costs might, according to the principles which govern actions for money paid, and which will be found in the note to *Lampleigh v. Brathwait* (2), have been recovered as money paid by the plaintiffs for the defendants at their request.

If the question here were whether the defence was reasonable or not, I must say that I think it was entirely unreasonable. But this would not dispose of the whole claim. For it might be asked, what were the plaintiffs to do? It has been suggested that they should have let judgment go by default, but that would touch the question of amount only, not of liability.

(1) Law Rep. 8 C. P. 227.

(2) 1 Sm. L. C. 6th ed. at p. 142.

In *Mors le Blanch v. Wilson* (1) it was left to the jury in a very similar case to the present to say whether the plaintiff had adopted a reasonable course or not in defending an action for damage brought against him. I believe that in the opinion of my Brother Lush that case is distinguishable from this one; but I feel great difficulty myself in seeing any distinction. I think, therefore, that in the Court below Mr. Williams had a right to rely upon that case as authoritative, but I confess that the decision does not appear to me to be satisfactory. The ground of my present decision is, that the costs claimed are not the proximate consequence of the defendants' breach of duty.

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LUSH, J. I am of the same opinion; and my judgment proceeds upon the ground that the costs claimed are not the natural consequence of the defendants' breach of contract, nor were they incurred at their request or for their benefit. There were two separate contracts; one between Harding and the plaintiffs, and the other between the plaintiffs and the defendants. The defendants knew of no one but the plaintiffs in the matter; and it might well have been that the plaintiffs were liable to Harding on their contract, and yet that the defendants were not liable to the plaintiffs on theirs, or vice versâ. Upon the action by Harding being commenced, the plaintiffs informed the defendants, who, on the 15th of December, replied that they were protected by the Carriers Act, and that they would have nothing to do with the defence of the action. This position they continued to maintain. The plaintiffs nevertheless defended Harding's action, but without success, and now claim their costs from the defendants as well as the damages (650*l.*) which they had to pay Harding.

Now it should be observed, that the plaintiffs might have sued the defendants at once, when the measure of the defendants' liability would have been the injury to the pictures. The defendants' neglect was in not carrying the goods safely, and the plaintiffs, though themselves protected by their contract with Harding, might still have recovered against them. This, then, is not as the Court below appear to have thought, a case "in which a person incurs a liability in consequence of the neglect or default of another in

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some duty owing to him." The defendants incurred no liability to Harding, and their liability to the plaintiffs was quite apart from any liability of the plaintiffs to Harding. The costs of defending Harding's action therefore cannot be said to be the consequence of the defendants' default. The two things have no connection whatever with each other.

But the Court below also place their judgment upon the ground that it was reasonable that the plaintiffs should have the damages assessed in Harding's action. It may have been reasonable for their own benefit; but as the defendants could not be bound by the assessment, I do not see how it could be for theirs.

Again, we have been pressed with the difficulty in which the plaintiffs were placed; but as to that the difficulty arises from the nature and magnitude of their business, and ought not to influence our decision upon the question before us. It remains to add a few words with regard to *Mors le Blanch v. Wilson* (1), upon which it appears that the Court below acted. In my opinion there is no analogy between the two cases. In that case the amount of demurrage ascertained in the first action would necessarily be the measure of damages in the second; and, moreover, there the jury expressly found that the plaintiff had adopted a reasonable course in defending the first action. I think, therefore, that our decision in this case is not really in conflict with that of the Court of Common Pleas.

QUAIN, J. If this were a contract of indemnity where, although there may be two contracts in form, there is only one in substance, our decision might be in favour of the plaintiffs. In such a case, a surety who is called upon to pay the debt due or duty owing from the principal may well be justified in defending an action at the principal's expense. The cases which have been referred to, with one exception, are all cases of indemnity, and really have no application here. For we have to deal with two separate and independent contracts, and it would, it seems to me, be very unreasonable to hold that the plaintiffs should be able to charge the defendants against their will and without their sanction with the costs of an action brought upon a contract made by the plaintiffs

(1) Law Rep. 8 C. P. 227.

with Harding, to which the defendants were no parties and with which they had no concern whatever.

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This case, then, is not one of principal and surety; and the only ground on which the plaintiffs can recover these costs is, that the costs are the natural and reasonable consequence of the defendants' breach of contract, and therefore within the well-known rule laid down in *Hadley v. Baxendale*. (1) But I am clearly of opinion that they cannot be so considered. If the defendants had chosen to undertake the defence, then no doubt an action for money paid would have been maintainable upon the principle of the cases cited in the note to *Lampleigh v. Brathwait*. (2) But the evidence here is that, from first to last the defendants refused to have anything to do with Harding's action.

With regard to *Mors le Blanch v. Wilson* (3), that is, I think, an authority for the plaintiffs. I am unable to distinguish it from this case. There, as here, there were two separate and independent contracts; and I do not think, with deference to my Brother Lush, that the assessment of damages against Mors le Blanch was conclusive in his action against Wilson. But sitting here we are not bound by that case, which appears to have proceeded upon a mere dictum of Parke, B., in *Tindal v. Bell*. (4) I agree with my Lord and my Brother Keating in thinking it wrongly decided.

ARCHIBALD, J. I am of the same opinion. These costs cannot be claimed by reason of the defendants having given any actual authority to incur them. Nor were the plaintiffs compelled to incur them by reason of the defendants' default. In other words, they were not the natural and necessary consequence of that default. The contracts were wholly independent, and the damages recovered against the plaintiffs by Harding were not of necessity the same as those which the plaintiffs could recover against the defendants. The assessment in the first action could not in any shape be conclusive against the defendants.

(1) 9 Ex. 341; 22 L. J. (Ex.) 179.

(2) 1 Sm. L. C. 6th ed. at p. 142.

(3) Law Rep. 8 C. P. 227.

(4) 11 M. & W. at p. 231.



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With regard to *Mors le Blanch v. Wilson* (1), I cannot see any distinction between it and the present case. My Brother Lush has pointed out what he considers to be a distinction; but I cannot see why, in that case, the damages assessed against Mors le Blanch furnished a conclusive test of those which he could recover against Wilson. There, as here, the contracts were separate and independent, and Mors le Blanch might have sued Wilson before he had been sued himself, and so have settled the question of demurrage, just as here the plaintiffs might at once have sued the defendants. If, therefore, it be necessary to pronounce an opinion as to *Mors le Blanch v. Wilson* (1), I should hold it open to the same objection as the decision of the Court below in this case.

*Judgment reversed.*

Attorneys for plaintiffs: *Upton, Johnson, & Co.*

Attorney for defendants: *T. C. Church.*

(1) Law Rep. 8 C. P. 227.

END OF MICHAELMAS TERM, 1874.

CASES  
 DETERMINED BY THE  
 COURT OF EXCHEQUER,  
 AND BY THE  
 COURT OF EXCHEQUER CHAMBER  
 ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,  
 IN AND AFTER  
 HILARY TERM, XXXVIII VICTORIA.

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ARMSTRONG *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY  
 COMPANY.

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*Negligence—Collision between Railway Carriages—Identification of Passenger  
 with his Driver—Joint Wrong-doers.*

The plaintiff, one of the travelling inspectors of the carriage and waggon department of the L. and N. W. Railway Company, was travelling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. Station, and on the line of the defendants, over which the L. and N. W. Railway had running powers, the train in which the plaintiff was travelling came into collision with a number of loaded waggons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendants.

The jury found that the accident was caused by the joint negligence of the defendants and the L. and N. W. Railway Company :—

*Held*, approving of the decision in *Thorogood v. Bryan* (8 C. B. 115), that the plaintiff was so far identified with the L. and N. W. Railway Company that he could not recover :

*Semle*, that the evidence did not support the finding of the jury with regard to the defendants, but shewed that the L. and N. W. Railway were solely responsible for the accident.

DECLARATION that plaintiff was lawfully travelling in a train of carriages drawn by a locomotive engine lawfully being and

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running on a railway of the defendants, and the defendants so negligently conducted themselves in the control and management of their railway, and in keeping the same in proper order and condition, that the train of carriages in which the plaintiff was then travelling ran into and came into collision with a train of waggons and trucks of the defendants then standing and being on the railway, whereby the plaintiff was injured, &c.

Plea: not guilty. Joinder of issue.

At the trial before Archibald, J., at the Manchester Summer Assizes, 1874, it was proved that the plaintiff, one of the travelling inspectors of the carriage and waggon department of the London and North Western Railway Company, was in August, 1873, travelling under a pass from them in one of their trains from Leeds to Manchester. This train had to pass Clayton Bridge Station, which is on a branch of the defendants' railway, over which branch the London and North Western have running powers. Upon arriving at the station the train ran against some coal waggons which were being shunted from a siding by the defendants, and the plaintiff was seriously injured. There was evidence that the collision was owing to the driver of the train approaching Clayton Bridge distant-signal, on a hazy day and when the rails were slippery, at so high a speed that he was unable to stop when he came in sight of the distant-signal, which had been placed at danger by the defendants. He stated, however, that owing to the weather being hazy he was unable to see the signal until it was too late. The jury found that the collision was caused by the joint negligence of the London and North Western Company and of the defendants, and assessed the damages at 400*l*. The learned judge directed a verdict for the defendants, with leave for the plaintiff to move.

A rule having been obtained accordingly, to enter the verdict for the plaintiff, upon the ground that upon the facts as proved and found by the jury, the judge was wrong in directing the verdict to be entered for the defendants,

*Herschell, Q.C.*, and *Crompton* shewed cause. The learned judge was right in directing the verdict to be entered for the defendants. *Thorogood v. Bryan* (1) is in point. There the plaintiff, a pas-

senger by an omnibus, was run over by a second omnibus, of which the defendant was owner, and it was held that if the jury thought that want of care in the driver of the plaintiff's omnibus conduced to the accident, their verdict must be for the defendant, for the plaintiff must be taken to be identified with the driver of the omnibus in which he was passenger; and in the previous case of *Bridge v. Grand Junction Ry. Co.* (1) the Court of Exchequer appear to have held a similar opinion, in a case where a collision had taken place between two railway trains. *Thorogood v. Bryan* (2) has never been overruled. It is true that in *The Milan* (3), a proceeding by the owner of cargo in a brig against a steamer with which the brig came into collision, Dr. Lushington declined to be bound by *Thorogood v. Bryan* (2), and said that he disapproved of it. But the learned judge practically followed the decision, for, considering that both ships were in fault, he directed the steamer to pay, according to Admiralty practice, half the damage to the plaintiff, and thereby he identified the owner of the cargo with the owner of the ship in which it was carried. At common law the passenger is identified with the carrier. In *The Milan* (3) the owner of the cargo is identified with the shipowner. *Thorogood v. Bryan* (2) is also criticised in the note to *Ashby v. White*. (4) But a mere opinion ought not to avail against a decision which has always been followed.

[BRAMWELL, B. There might be a case in which a person was unable to get out of the way of two omnibuses owing to the misconduct of the drivers. He might sue either, but I think he would have to allege that the accident was caused by the negligence of the defendant and the driver of another omnibus.]

In *Waite v. North Eastern Ry. Co.* (5), where a child was injured partly by the negligence of its grandmother, in whose care it was, and partly by the negligence of the company, Williams, J., expresses his opinion that there was an identification between the child and the person in charge of it, and evidently treats *Thorogood v. Bryan* (2) as settled law. Secondly, the finding of the jury

(1) 3 M. &amp; W. 244.

(4) 1 Sm. L. C. at p. 266, 6th ed.

(2) 8 C. B. 115; 18 L. J. (C.P.) 336.

(5) E. B. &amp; E. 719; 28 L. J. (Q.B.)

(3) Lush. Adm. 388; 31 L. J. (P. 258.

M. &amp; A.) 105.

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is not consistent with the facts proved at the trial. Admitting that the defendants might be liable to the plaintiff for some misfeasance on their part, they cannot be liable for a mere non-feasance in leaving some waggons on their line, which would have caused no harm, but for the carelessness of the London and North-Western train in not observing the danger signal. If there had been due care on the part of the London and North-Western the accident would never have happened. The jury say that the defendants were guilty of negligence, but they merely gave an opportunity to some one else to be negligent. [They also referred to *Davies v. Mann* (1); *Rigby v. Hewitt* (2); *Wright v. Midland Ry. Co.* (3)]

*Pope, Q.C.*, and *G. B. Hughes*, in support of the rule. The plaintiff is entitled to the verdict. In the first place, *Thorogood v. Bryan* (4), assuming it to be rightly decided, is distinguishable. There there was contributory negligence on the part of the plaintiff himself in getting out of the omnibus in the middle of the road, instead of at the kerb. But the soundness of the decision has always been questioned. The statement that the passenger is "identified" with the driver is surely inaccurate. Where is this identification to stop? Why may not the passenger be liable in an action for the driver's negligence?

[*POLLOCK, B.* The identification does not involve any volition on the part of the passenger. It merely means that he has equal rights with the driver.]

Besides the doubts expressed by *Dr. Lushington* in *The Milan* (5), and by the editors of *Smith's Leading Cases* in *Ashby v. White* (6), *Williams, J.*, in *Tuff v. Warman* (7), speaks of the case as having been criticised, and the fact is also mentioned in *Manley Smith on Master and Servant*, 3rd ed. p. 281. In America, it appears from *Shearman and Redfield on Negligence*, 2nd ed. p. 53, s. 46, to be held that where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plain-

(1) 10 M. & W. 546.

(2) 5 Ex. 240; 19 L. J. (Ex.) 291.

(3) Law Rep. 8 Ex. 137.

(4) 8 C. B. 115; 18 L. J. (C.P.) 336.

(5) Lush. Adm. 388; 31 L. J. (P. M. & A.) 105.

(6) 1 Sm. L. C. at p. 266, 6th ed.

(7) 2 C. B. (N.S.) at p. 750; 26 L. J. (C.P.) 265.

tiff's control, or that he controlled the plaintiff's personal conduct: and the cases of *Eaton v. Boston and Lowell Ry. Co.* (1), and *Webster v. Hudson River Ry. Co.* (2), are referred to, which fully support the proposition. Where the driver is the plaintiff's servant or agent, there may be no remedy. But in the case of a railway train, omnibus, or public conveyance, the passenger has no voice in the selection of the driver.

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BRAMWELL, B. I think this rule must be discharged. It is impossible to distinguish the case from *Thorogood v. Bryan* (3), except in one particular, which is in the defendants' favour. It must not be supposed, so far as my opinion is of any value, that I am at all dissatisfied with *Thorogood v. Bryan*. (3) Mr. Pope admits that if his contention is right, the owner of a bale of goods carried by the defendants, and damaged by an accident similar to this, would be entitled to maintain an action, also that if a carriage had been lent by the owner, and injured by the joint negligence of the driver and a third person, the owner could sue such person for the damage. It seems to me that these are startling propositions. Then there is another difficulty. If this action is maintainable, in what sense are the defendants joint wrong-doers with the London and North Western Company? Can there be a joint liability with regard to the negligence, or breach of duty to the plaintiff, and no joint liability with regard to the contract under which he was carried as passenger? Could another action be maintained by the plaintiff against the London and North Western Company? Suppose the plaintiff had been merely an ordinary passenger, could he first of all maintain an action against the London and North Western Company, which carried him, for breach of contract, and then another action against the Lancashire and Yorkshire Company, by whose negligence the coal waggons were left on the line? These are questions worthy of consideration. But in the present case there seems to be good reason why the rule in *Thorogood v. Bryan* (3) should apply. The plaintiff cannot maintain an action against the London and North

(1) 11 Allen, Rep. 500.

(2) 38 New York Rep. 260.

(3) 8 C. B. 115; 18 L. J. (C.P.) 336.

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Western Company, because he was their servant, and yet it is said that he may maintain an action against another company who only contributed to the mischief, and were certainly not the proximate cause of it. It must follow, therefore, that while the servant of a railway company, in case of a collision, may sue what I may call the opposing company, he cannot sue the company who are the proximate cause of his injury. But I am prepared to decide this case on the authority of *Thorogood v. Bryan* (1), which has never been overruled. As I have said, I think it is distinguishable from this case in a point favourable to the defendants. And I think that upon this rule the defendants may avail themselves of the evidence at the trial, without being concluded by the finding, and although they have no cross rule. In assenting to the leave to move, the counsel for the defendant does not adopt the proceedings except so far as there is evidence to support them. The question whether there was evidence of negligence by the defendants must be considered to have been left open, and I think it might be put in this way:—The defendants were possibly guilty of negligence, but was it negligence the consequences of which might have been avoided with reasonable care? It seems to me that upon the evidence the defendants might have brought an action for any damage sustained by their carriages against the London and North Western Company, and *Davies v. Mann* (2) would be an authority in favour of the action.

POLLOCK, B. I also think the rule ought to be discharged. It is sufficient to say that the case is not distinguishable from *Thorogood v. Bryan* (1), though it must not be supposed that I am dissatisfied with that decision. The only difficulty in it arises from the use of the word “identified” in the judgment. If it is to be taken that by the word “identified” is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition, which could not be entirely sustained. But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. This is

(1) 8 C. B. 115; 18 L. J. (C.P.) 336.

(2) 10 M. & W. 546.

illustrated by the case of *Waite v. North Eastern Ry. Co.* (1), where it was held that a child, with regard to contributory negligence, was identified with its grandmother who accompanied it, though it was impossible to say that there was any selection of the companion, or any act of volition on the part of the child. Then, if the rule laid down by Parke, B., in *Bridge v. Grand Junction Ry. Co.* (2), "that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover," be adhered to, it does not seem to me that there is any very great hardship on the plaintiff. He is in the same position as if he had been the animal injured in *Davies v. Mann.* (3) He is entitled, notwithstanding the negligence of the driver of his own train, to recover against the defendants if they have been guilty of any such negligence as was proved in *Davies v. Mann.* (3) It may be said, why should he not have a right of action against both companies? The answer is, he may have such an action against two tortfeasors, but there is no hardship in saying that if two independent persons are in a position somewhat hostile to each other, then the right to maintain a separate action against one may be an answer to an action brought against the other, for the plaintiff has to shew that the negligence of the person whom he sues is the proximate cause of the accident.

*Rule discharged.*

Attorneys for plaintiff: *W. A. Holcombe, for T. E. Jones, Manchester.*

Attorneys for defendants: *Clarke, Woodcock, & Ryland, for T. A. & J. Grundy & Co., Manchester.*

(1) E. B. & E. 719; 28 L. J. (Q.B.) 258.

(2) 3 M. & W. 244, at p. 248.

(3) 10 M. & W. 546.

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Jan. 29.

## HEMMING v. BATCHELOR.

*Practice—Death of Plaintiff after Nonsuit—Abatement of Action—Right of Defendant to enter Judgment nunc pro tunc—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 139—Rule 56 of Hilary Term, 1853.*

In an action against the defendant for negligently allowing an area to remain open in a highway, whereby the plaintiff (an infant, suing by next friend), was injured, the case was tried after term, and a nonsuit directed, on the ground that there was no evidence of negligence; the judge staying execution to enable the plaintiff to move to set aside the nonsuit. During the vacation the plaintiff died. In the following term, the plaintiff's next friend obtained a rule nisi to set aside the nonsuit, on the ground that there was evidence of negligence, and the defendant a rule nisi to tax his costs, or why the Court should not allow judgment to be signed for him nunc pro tunc :—

*Held*, that the action having abated by the plaintiff's death, a motion to set aside the nonsuit could not be entertained. As however the judge by staying execution had intimated that he regarded the question as to the defendant's liability a doubtful one, judgment nunc pro tunc ought not to be entered for the defendant. The defendant's rule must be discharged, without costs, and the plaintiff's rule allowed to drop.

DECLARATION by plaintiff (an infant, suing by next friend) against the defendant, for negligently allowing an area or cellar in his possession, under a highway, to be open, whereby the plaintiff fell in and was injured.

Plea, not guilty. Joinder of issue.

At the trial before Pollock, B., at the Middlesex sittings after Trinity Term, 1874, the learned judge expressed his opinion that there was no evidence of negligence for the jury, and (the defendant having refused to consent to leave being reserved to the plaintiff to move to enter the verdict in his favour), he nonsuited the plaintiff, but stayed execution till the fifth day of Michaelmas Term, to enable the plaintiff to move to set aside the nonsuit, or for a new trial.

In the Long Vacation the plaintiff died. In Michaelmas Term, application was made for a rule for the defendant to shew cause why the nonsuit should not be set aside or a new trial had. The Court refused to grant any rule; but said that if it should become necessary to move to set aside the nonsuit from the defendant proceeding to tax his costs as against the plaintiff's next friend, they would hear the motion, as if it were made on the first occasion.

At the end of the term, the defendant gave notice of taxation of his costs of the nonsuit. The master declined to tax without a judge's order, and such an order was refused by Pollock, B. The defendant then obtained a rule for the plaintiff to shew cause why the master should not tax the defendant's costs, or why the Court should not allow judgment for the defendant to be signed *nunc pro tunc*, and the plaintiff obtained a rule *nisi* to set aside the nonsuit, on the ground that there was evidence of negligence for the jury. The two rules were argued together.

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*McIntyre, Q.C.*, and *Reid*, now shewed cause against the plaintiff's rule, and argued, first, that there was not sufficient evidence of negligence on the part of the defendant. [It is unnecessary to refer to this part of the argument.] Secondly, assuming that there was sufficient evidence, the action, being for an injury affecting the plaintiff personally, abated by his death, and the right given by the Common Law Procedure Act, 1852, to the representative of a deceased plaintiff to enter a suggestion and continue the action, only applies to cases where the action would, before the statute, have survived: *Flinn v. Perkins*. (1) It is true that this is not a motion to enter a suggestion, as in that case, but it is a motion for a new trial with the object of continuing the action; and the same reasoning applies. Even if such a motion could be made, the next friend is not the personal representative of the infant. It is true that in *Freeman v. Rosher* (2), where there was a verdict for the plaintiff with leave for the defendant to move to enter a verdict, and the defendant died after the trial and before the next term, a motion to enter the verdict was allowed to be made, without putting the executors of the defendant on the record or making them parties to the rule, but that must have been on the ground that the leave reserved was equivalent to a consent that the action should survive. Again, the plaintiff was here nonsuited at the trial, and judgment would have been signed by the defendant, but for the stay of execution. The delay was, therefore, the act of the Court, and judgment ought to be entered for the defendant *nunc pro tunc*, according to rule 56 of Hilary Term, 1853.

*Cole, Q.C.*, and *Cowie*, in support of this rule.

(1) 32 L. J. (Q.B.) 10.

(2) 13 Q. B. 780; 18 L. J. (Q.B.) 340.

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[THE COURT intimated that they would hear the argument on both rules before giving judgment.]

Sect. 139 of the Common Law Procedure Act, 1852, which enacts that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict, is in the words of 17 Car. 2, c. 8, s. 1, and it was held that that section did not apply to cases of nonsuit: *Dowbiggin v. Harrison*. (1) The defendant will, no doubt, rely on the case of *Moor v. Roberts* (2), where the plaintiff having died in the interval between the trial (where a verdict had been directed in his favour, with leave for the defendants to move) and a rule being made absolute for a nonsuit, the Court ordered judgment to be entered *nunc pro tunc*.

[POLLOCK, B. Does that case decide more than that the Court thought that they had a power to enter judgment *nunc pro tunc* under the particular circumstances?]

The Court has a discretion, and it is submitted that this is a case in which it will not interfere.

[They were then stopped.]

*McIntyre, Q.C.*, and *Reid*, in support of their rule. The defendant is entitled to have judgment entered *nunc pro tunc*. It is clear that the nonsuit must stand, and this being so, the stay of execution, the act of the Court, was all that prevented the defendant from signing judgment in fourteen days. Where the defendant died pending the argument on a point reserved, on which judgment of nonsuit was afterwards given, the Court ordered the judgment to be entered up of the term next after the trial, in order that his representatives might have the costs of the nonsuit: *Toulmin v. Anderson*. (3)

[KELLY, C.B. We are prepared to hold at once, that we have no power to grant a new trial. Is there any Act which compels us to allow the defendant to enter judgment *nunc pro tunc*?]

The case of *Moor v. Roberts* (2) is in favour of the defendant's rule being made absolute.

(1) 10 B. & C. 460.

(2) 3 C. B. (N.S.) 844; 27 L. J. (C.P.) 161.

(3) 1 Taunt. 384.

KELLY, C.B. In this case we are called upon to exercise our discretion in a matter of considerable importance. The plaintiff, an infant, brought an action against the defendant, and this action was one of the class to which the rule "*actio personalis moritur cum personâ*" applies. The action proceeded to trial, and at the close of the plaintiff's case the learned judge directed a nonsuit, and was desirous of putting the case in such a shape as might be most convenient for an appeal. This desire was counteracted by the defendant's refusal to leave being reserved to the plaintiff to move to enter the verdict in his favour; but at the same time we must assume that the learned judge had some doubt as to whether the nonsuit was in accordance with the law, for he stayed execution till the fifth day of Michaelmas Term, to enable the plaintiff to move for a new trial. In the interval the plaintiff died. At the beginning of term an application was made for a rule nisi to set aside the nonsuit, and a rule nisi would no doubt have been granted but for the plaintiff's death; but owing to this obstacle the Court merely gave the plaintiff's next friend permission to move, in case it should be necessary. The defendant afterwards applied to Pollock, B., in Chambers, for an order to tax his costs; but the learned Baron refused to make any such order. The defendant then waited till the last day of term, when the time for moving to set aside the nonsuit had elapsed, and then moved to rescind the order of Pollock, B., and for power to sign judgment *nunc pro tunc*. Now, with regard to this application, it is clear that to ask us to enter judgment *nunc pro tunc* is to ask us to enter it as of a date when the learned judge who tried the case expressly refused to allow it to be entered. The question therefore is, are there any precedents for entering judgment *nunc pro tunc* where the judge who tried the case was himself of opinion that the judgment ought not to be entered. Now there is neither Act of Parliament, regulation, nor settled practice which compels the Court to make such an order under circumstances like the present. There are cases, no doubt, where a decision upon the merits has been obtained, and where, owing to the death of one of the parties, effect cannot be given to this decision without the intervention of the Court. But the principle of those cases cannot apply where the learned judge has expressly withheld from the defendant the power to sign judg-

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ment; for if it were otherwise, we should overrule what is equivalent to an opinion that no judgment ought to be signed until the decision of the full Court had been obtained. [After referring to the evidence of negligence, the Lord Chief Baron said:] It is unnecessary to express any opinion as to the defendant's liability; but having regard to our decision on the defendant's application, I think the plaintiff's rule may be allowed to drop.

POLLOCK, B. I am of the same opinion. By rule 56 of Hilary Term, 1853, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the Court or a judge to order a judgment to be entered *nunc pro tunc*." I refer to this rule for the purpose of drawing attention to the word "competent." This word is explained by what was the practice before any such rule of court existed. It was then the practice of the courts, if either party died pending the time taken for argument on a motion in arrest of judgment or for a new trial, to enter judgment as of the term in which judgment would otherwise have been given. This judgment *nunc pro tunc* was a fiction of which the Courts availed themselves for the purpose of aiding the party whom they thought entitled to judgment. Now here, after the plaintiff's case was closed, I, at the request of the defendant, directed a nonsuit; but I should certainly require more time for consideration before I decided whether the nonsuit should stand. The rule of court as to the entry of judgment does not, therefore, apply to the present case. With regard to the plaintiff's rule, it is perfectly clear that there cannot be a new trial, and that there is no authority for our granting it. I think that, under these circumstances, that rule may be allowed to drop.

AMPHLETT, B. I am of the same opinion. As soon as the position of the case was explained to me, I felt that it was impossible but that some way existed of avoiding so great an injustice as compelling the plaintiff's next friend to pay the costs of this action. The learned judge at the trial stayed execution because he thought the liability of the defendant a subject fit for discussion, and this

discussion cannot now take place because of the death of the person injured. Under these circumstances I think the defendant cannot ask us, where the matter is in our discretion, to assist him. I do not think it necessary to add anything upon the subject of the plaintiff's rule, which cannot possibly be made absolute, and which I think may well be allowed to drop.

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*Plaintiff's rule allowed to drop; defendant's rule discharged without costs.*

Attorneys for plaintiff: *Dangerfield & Blythe.*

Attorneys for defendant: *Nash, Field, & Co.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 8.

HOLKER v. PORRITT.

*Easement—Water—Natural and Artificial Stream—Riparian Owner.*

A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell; the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface, and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867 he conveyed the mill, with all water rights, to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of the water:—

*Held* (affirming the judgment of the Court below), that the plaintiff was entitled to maintain the action.

APPEAL from the judgment of the Court of Exchequer discharging a rule obtained by the defendant to enter the verdict for him. (1)

The facts of the case were as follows:—From time immemorial two streams flowing down to a deep open valley called Buckden Ginnell, there joined, and the united stream was carried along an artificial embankment across Buckden Ginnell into the Broadwood Edge estate, and flowed to a point in Broadwood Edge Farm,

(1) Reported Law Rep. 8 Ex. 107.

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marked E. on the plan used at the trial. There it was divided by a stone or feather, which had existed as far back as any of the witnesses remembered, and as to the origin of which there was no evidence. Part of the divided stream flowed down into Buckden Brook, and thence into the River Irwell; the other part flowed to a watering trough in Silas Wilson's farm, which formed part of the Lumn Hall estate. The water which flowed to the watering trough was formerly used for cattle and for domestic purposes, and the residue overflowed the trough, became diffused over the surface, and discharged itself by percolation through the soil.

In 1845 a Mr. Walker became owner of the Lumn Hall estate, which extended from Broadwood Edge to the River Irwell, and which was copyhold of the manor of Tottington, in the Salford division of the county of Lancaster. The estate comprised a cotton mill, situated on the banks of the Irwell, about half a mile distant from Silas Wilson's farm; this mill Walker proceeded to alter into a paper mill, and for the purpose of supplying it with water he constructed lodges or reservoirs adjacent to the mill, which, in 1846 and 1847, he connected with the watering trough on Silas Wilson's farm.

In 1865 Walker purchased the Broadwood Edge estate, which was also copyhold of Tottington Manor.

In 1867 he conveyed to the plaintiff the paper mill, with the lodges and reservoirs, and with power to enter on the Lumn Hall and Broadwood Edge estates to repair and construct weirs and goits, and also the full and free use and enjoyment of all springs, wells, and streams of water in, under, upon, or arising or issuing in or from any part of the Lumn Hall and Broadwood Edge estates. The land so conveyed was, at the nearest point, 400 yards distant from Silas Wilson's farm.

The defendants were owners of land traversed by the two streams which united in Buckden Ginnell, and the action was brought to recover damages for an obstruction by them of these two streams.

At the trial of the cause before Willes, J., at the Manchester Summer Assizes, 1872, an obstruction was admitted, and a verdict was entered for the plaintiff by consent, with 40s. damages, with leave to the defendants to move to enter a nonsuit or a

verdict for them, if the plaintiff was not entitled to maintain this action.

A rule having been obtained and afterwards discharged (1), the defendants appealed.

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Nov. 29, 30, 1874. *Herschell, Q.C.* (*Pope, Q.C.*, and *Baylis* with him), argued for the defendants.

*Holker, S.G.* (*Kemplay, Q.C.*, and *Gorst*, with him), for the plaintiff.

The following authorities were referred to:—*Laing v. Whaley* (2); *Stockport Waterworks Company v. Potter* (3); *Hodgkinson v. Ennor* (4); *Sampson v. Hoddinott* (5); *Nuttall v. Bracewell* (6); *Miner v. Gilmour* (7); *Mason v. Hill* (8); *Dickinson v. Grand Junction Canal* (9); *Acton v. Blundell* (10); *Dudden v. Clutton Union* (11); *Chasemore v. Richards* (12); *Webb v. Bird* (13); *Wood v. Waud* (14); Gale on Easements, 3rd ed. pp. 5, 102, 244, &c.; Angell on Watercourses, pp. 157, 158.

*Cur. adv. vult.*

Feb. 8, 1875. The judgment of the Court (Lord Coleridge, C.J., Keating, Lush, Quain, and Archibald, JJ.), was delivered by

LUSH, J. Upon the hearing of this appeal before us at the sittings after the last term, two questions were principally argued, first, whether the conveyance of the surplus water by means of the drain from the watering trough to the mill is to be considered as a prolongation of the stream entitling the mill-owner to the ordinary riparian rights thereon; and, secondly, if not, whether by the enjoyment without interruption for more than twenty years, first by Walker and afterwards by the plaintiff, the latter had

(1) Law Rep. 8 Ex. 107.

(2) 3 H. & N. 675; 5 H. N. 480;  
26 L. J. (Ex.) 327; 27 L. J. (Ex.)  
422.

(3) 3 H. & C. 300.

(4) 4 B. & S. 229; 32 L. J. (Q.B.)  
231.

(5) 1 C. B. (N.S.) 590; 26 L. J.  
(C.P.) 148.

(6) Law Rep. 2 Ex. 1.

(7) 12 Moo. P. C. 131.

(8) 3 B. & Ad. 304; 5 B. & Ad. 1.

(9) 7 Ex. 282; 21 L. J. (Ex.) 241.

(10) 12 M. & W. 324.

(11) 1 H. & N. 627; 26 L. J. (Ex.)  
146.

(12) 7 H. L. C. 349.

(13) 10 C. B. (N.S.) 268; 13 C. B.  
(N.S.) 841; 30 L. J. (C.P.) 384; 31  
L. J. (C.P.) 335.

(14) 3 Ex. 748; 18 L. J. (Ex.)  
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acquired a right to the water as an easement by virtue of the Prescription Act.

Upon consideration of the peculiar facts of this case, we think that the plaintiff's title rests on a broader ground, and that he need not resort either to the theory of an extension of the stream or to the Prescription Act. It must be taken, upon the facts stated, that the owner of Silas Wilson's Farm had a prescriptive right to the maintenance of the stone or feather at the point E., and of the diversion by means of it of part of the stream to and for the exclusive use of the farm. The water which came down to him at the farm was his own to use it as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner, who only shares the use of the water in common with other riparian owners. In collecting the overflow at the trough and conveying it to the mill, he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property. Nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste, he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrong-doer became more serious after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have to be paid for it; but it is a fallacy to say that a man's rights are abridged if, when he abuses them, he has to make larger compensation. It is the necessary effect of every appropriation of running water to a new and more beneficial use that a wrongful diversion or abstraction entails a larger measure of liability. It is established by many authorities, which are collected in and confirmed by *Mason v. Hill* (1), that as soon as the owner of land on a stream has appropriated the water to a beneficial use he may sue for the injury done to him in respect of such new use. In that case the proprietor having appropriated the stream to the use of a mill

(1) 5 B. & Ad. 1.

newly erected, was held entitled to recover from a proprietor higher up the stream damages for the injury to his mill occasioned by the wrongful diversion of the stream, although before the mill was built the wrong-doer would only have been liable to nominal damages.

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If, therefore, Walker had been in possession of the mill in question, it is clear to us that he could have brought this action, not because he happened to be at the same time riparian owner higher up than the mill and also owner of the mill, but simply as owner of the mill. And there is no conceivable reason why the plaintiff should not have the same right, inasmuch as he is surrenderee of the mill with all the water rights annexed, and which had become appurtenant to it. Walker had chosen to create a servitude on his own land, but none has been created, or been attempted to be created, on the lands or riparian rights of the defendants.

None of the authorities cited conflict in the least degree with this view. In the case of *Stockport Waterworks Co. v. Potter* (1) the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest; and it is clear that such use of the water could only grow into a right by twenty years' enjoyment. Whether that case was rightly decided or not; whether the grounds upon which the majority decided can be maintained, or whether it is distinguishable from *Nuttall v. Bracewell* (2) we need not now consider. The present case stands clear both of the difficulty and the reasoning in that case, and we have no hesitation in holding, for the reasons we have given, that the judgment of the Court below ought to be affirmed.

*Judgment affirmed.*

Attorneys for plaintiff: *Milne, Riddle, & Mellor.*

Attorneys for defendants: *Woodcock & Ryland.*

(1) 3 H. & C. 300.

(2) Law Rep. 2 Ex. 1.

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Feb. 12.

[IN THE EXCHEQUER CHAMBER.]

LARCHIN *v.* THE NORTH WESTERN DEPOSIT BANK.*Bill of Sale—Sufficiency of Description of Grantor—"Accountant."*

The grantor of a bill of sale was described in the affidavit filed under the Bills of Sale Act, as an "accountant." He was in fact a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but in his leisure time was occasionally employed to balance tradesmen's books:—

*Held* (affirming the decision of the Court below), an insufficient description.

APPEAL from the judgment of the Court below, discharging a rule obtained by the plaintiff in an interpleader issue to enter the verdict for him.

At the trial of the issue before Bramwell, B., at the Surrey Summer Assizes, 1872, it appeared that the bill of sale under which the plaintiff claimed was granted by one Samuel Whitehead, who was a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but also, in his leisure time after office hours, was sometimes employed by tradesmen at Acton, where he resided, to balance their books. In the affidavit filed with the bill of sale under the Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, he was described as an "accountant." The learned judge held the description to be insufficient, and a verdict was entered for the defendants, with leave to the plaintiff to move for a rule to enter the verdict for him, which rule was afterwards obtained, and on argument discharged. (1) The plaintiff appealed.

*Talfourd Salter, Q.C.*, argued for the plaintiff, and cited *Hewer v. Cox* (2); *Briggs v. Boss* (3); *Allen v. Thompson*. (4)

*Prentice, Q.C.*, for the defendants, was not called on.

BLACKBURN, J. The object of the Act is to give notice to all who are likely to deal with the grantor of the bill of sale; not to

(1) Law Rep. 8 Ex. 80.

(3) Law Rep. 3 Q. B. 268.

(2) 3 E. & E. 428; 30 L. J. (Q.B.) 73.

(4) 1 H. & N. 15; 25 L. J. (Ex.) 249.

enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale. The description given here would not convey such information, and to allow it to be good would be in effect to strike out of the Act the words which require a description of the grantor's "occupation." In *Briggs v. Boss* (1) we went quite as far as we ought to go.

MELLOR, J. I am of the same opinion. In *Briggs v. Boss* (1) I thought we went to the very extreme limit, and had considerable hesitation in concurring in that decision, and I certainly will not extend it.

LUSH, GROVE, DENMAN, and ARCHIBALD, JJ., concurred.

*Judgment affirmed.*

Attorney for plaintiff: *W. Norris.*

Attorneys for defendants: *Howard & Co.*

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Feb. 12.

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*County Court—Admiralty Jurisdiction—Demurrage—31 & 32 Vict. c. 71—32 & 33 Vict. c. 51, s. 2—Construction of Statutes—Costs.*

A claim for demurrage is not within the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, which only gives jurisdiction to county courts to try and determine causes which are within the jurisdiction of the Admiralty Court.

*Simpson v. Blues* (Law Rep. 7 C. P. 290) approved.

*Cargo ex Argos* (Law Rep. 5 P. C. 134) dissented from.

THESE were two rules calling on the plaintiffs in these actions respectively to shew cause why the allocatur of the master allowing the plaintiff's costs should not in each case be set aside, on the ground that the actions should have been brought in the county court.

In the case of *Gunnestad v. Price* the plaintiff was the owner

(1) Law Rep. 3 Q. B. 268.

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of a ship which had been chartered by the defendant. The action was brought upon the charterparty to recover a sum of 95*l.* 6*s.* 3*d.* on account of freight and demurrage. The defendant paid into court a sum of 36*l.* 16*s.* 2*d.*, and defended the action as to the rest of the claim.

The cause was tried in London at the sittings after Hilary Term, 1874, before Kelly, C.B., and a special jury, and a verdict was returned for the plaintiff for 19*l.* 1*s.* 9*d.* beyond the sum paid into court.

On the plaintiff's bill of costs coming before a master for taxation, it was objected, on behalf of the defendant, that, under the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51) s. 2, the action ought to have been brought in the county court, and that the plaintiff was, therefore, by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 9, not entitled to costs, and was liable for the defendant's costs. (1) The master being of opinion that the case could not have been brought in the county court, held that the plaintiff was entitled to his costs; and, for the purpose of raising the ques-

(1) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, jurisdiction is given to county courts in certain matters "in this Act referred to as Admiralty causes;" and by s. 9: "If any person shall take in the High Court of Admiralty of England or in any superior court proceedings which he might without agreement have taken in a county court, except by order of the judge of the High Court of Admiralty, or of such superior court, or of a county court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that Admiralty cause is limited by this Act . . . he shall not be entitled to costs, and shall be liable to be condemned in costs unless the judge of the High Court of Admiralty, or of a superior court before whom the cause is tried or heard shall

certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty of England or in a superior court."

By the County Court Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51, which is by s. 1 to be read as one with 31 & 32 Vict. c. 71) it is enacted (s. 2) that "any county court appointed, or to be appointed to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

"(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*"

tion, gave his allocatur for a sum agreed upon by the parties at 120*l*.

Subsequently to the taxation of costs, and after a rule nisi had been obtained to review the taxation, the plaintiff applied to and obtained from the learned judge a certificate that the cause was a proper cause to be tried in the superior court.

In the case of *Fullmore v. Wait* the action was also for demurrage. The claim in the declaration was for 100*l*. The defendant paid 78*l*. into court, which the plaintiff took out of court in full satisfaction of his claim, and entered a nolle prosequi as to the residue. In this case also, the master having made his allocatur for the plaintiff's costs, a rule was obtained to set aside the order.

Nov. 24, 1874. Against the first of these rules,

*Benjamin, Q.C.* (*Bigham* with him), shewed cause, and contended that the decision of the Court of Common Pleas in *Simpson v. Blues* (1) was right, and should be followed in preference to that of the Privy Council in *Cargo ex Argos*. (2) They also contended that the certificate was in time, and cited *Swift v. Jewsbury* (3) and *Lyons v. Hyman*. (4)

*Field, Q.C.*, and *Foard*, in support of the rule, contended that this was a claim arising out of an agreement made for the use of the ship, and should have been brought in the county court, and that the certificate having been given after judgment signed, and after the master's allocatur, was not within the competency of the learned judge.

In the second case,

*Cohen, Q.C.*, shewed cause, and contended that it would be a great hardship if the case were held to be within s. 9 of the Act of 1868, as the case not being "tried or heard," there could be no opportunity of asking for a certificate. The 9th section only applies to a case "tried or heard" before a superior court; for, according to the general rule of construction, a section does not apply to a case to which a proviso in the section cannot apply,

(1) Law Rep. 7 C. P. 290.

(2) Law Rep. 5 P. C. 134.

(3) Law Rep. 9 Q. B. 560.

(4) 5 Ex. 749; 20 L. J. (Ex.) 1.

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unless there is something to shew a contrary intention. This point was not brought to the notice of the Court in *Hewitt v. Cory*. (1) Upon the question as to jurisdiction, the Court of Common Pleas have, since the decision in *Cargo ex Argos* (2), adhered to their judgment in *Simpson v. Blues* (3), and that decision should be followed by this Court.

*R. E. Webster*, in support of the rule. The second Act was not merely to amend the first one, but "to give jurisdiction in certain maritime causes," which shews the extended scope of the second Act. Leave can always be obtained under the 9th section of the first Act; therefore, payment into court need not deprive the plaintiff of his costs if he takes that precaution. The 3rd section of the first Act gives the definition of Admiralty causes, and such a case as the present is within the definition.

*Cur. adv. vult.*

Feb. 12. The following judgments were delivered:—

CLEASBY, B. (4) It is unnecessary to state the facts of this case.

The claim is one by the owner of a ship against the charterer for demurrage, and the question raised and argued before us was whether such a claim, being under 300*l.*, could be entertained by the county court by a jurisdiction conferred upon it by the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51).

The County Courts Admiralty Jurisdiction Act, 1868, had first given Admiralty jurisdiction to the county courts, and by the Act of the next year the jurisdiction was extended. The question is, to what extent.

The first Act had only given the county courts jurisdiction to a limited amount in certain matters over which the Court of Admiralty had jurisdiction, and the question becomes, whether the late Act only increased the jurisdiction of the county courts over matters then subject to Admiralty jurisdiction, or created a new Admiralty jurisdiction.

(1) Law Rep. 5 Q. B. 418.

(2) Law Rep. 5 P. C. 134.

(3) Law Rep. 7 C. P. 290.

(4) Kelly, C.B., and Amphlett, B., concurred in this judgment.

The enactment by s. 2 is that any county court appointed to have Admiralty jurisdiction shall have jurisdiction to try the following causes:—"1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship; and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300l." Those words, in their natural sense, are no doubt large enough to comprise a claim by shipowners for demurrage which was not at the time the subject of Admiralty jurisdiction at all, and we have to consider whether there is any reason why they should receive a more limited construction so as to exclude such a claim.

If the words were so definite and specific as to apply themselves to an understood subject, they would speak for themselves, and there would be no ground for getting at their proper effect by construction. But if the language is general, and so general that it appears inapplicable without some limitation, then we are entitled to see by the immediate context or the subject-matter to which they are intended to apply, what, if any, limitation ought to be put upon them. Now, the words, in their terms, include causes (that is all causes) as to any claim whatever (whether made by shipowner, charterer, passenger, shipper of goods, consignee, or assignee of bill of lading, or any other person) arising out of any agreement relating to the use or hire of any vessel.

The words are not any agreement *for* the hire of any vessel, but *relating thereto*, and would therefore include an agreement for commission upon obtaining charter, or an agreement to repair, if coupled with an agreement to charter, and a variety of collateral agreements of that nature. The limitations of amount do not in any way limit the character of the claims, and the words may, I think, be regarded as general words, properly limited in their meaning, if there is anything in the context or the nature of the subject to limit them.

The maxim that general words are limited in their applications is constantly acted upon. The maxim itself is that expressed by Bacon (Max. Reg. 10):—"For all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person."

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Where they follow an enumeration of particular things, they do not introduce things of a higher and different character: see *Archbishop of Canterbury's Case* (1); *Casher v. Holmes*. (2) In the judgment in *Reg. v. Edmundson* (3), Lord Campbell lays down the rule thus:—"The general principle laid down in all the cases which have been cited is, that where particular words are followed by general words, the latter must be construed as ejusdem generis with the former." And in the judgment in *Reg. v. Cleworth* (4) the present Lord Chief Justice used the following language:—"Then there is a general expression, 'other person whatsoever'; but, according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis."

If, in the present case, instead of the general words in the section standing alone, we had an enumeration of the causes subject to Admiralty jurisdiction similar to what is contained in the third section of 31 & 32 Vict. c. 71, and had then had the general words found in the section in question, I should certainly have thought those general words would have been limited to causes of the same character as those enumerated, viz., causes over which the Court of Admiralty itself had jurisdiction.

As the two Acts are to be read together, and the first gives Admiralty jurisdiction and the second extends it, the particular words in the first may perhaps be regarded as followed by the general words in the second, and so the rule would apply.

But, independent of this, general words are to be limited to the subject-matter, as in the ordinary case of a recital in a deed qualifying general words of release following (not to mention other instances), as *Payler v. Homersham* (5); *Simons v. Johnson* (6): see note to *Roe v. Tranmarr*, Smith's Leading Cases, 6th ed., vol. 2, p. 468.

For example: if, in this case, taking the two Acts to be one, there had been a recital that it was expedient to enlarge the jurisdiction of the county courts, and no more, then the general words of the

(1) 2 Co. Rep. 46 a.

(2) 2 B. &amp; Ad. 592.

(3) 2 E. &amp; E. at p. 83; 28 L. J.

(M.C.) 213.

(4) 4 B. &amp; S. at p. 932.

(5) 4 M. &amp; S. 423.

(6) 3 B. &amp; Ad. 175.

enactment would be read by giving the fullest effect to them so as to enlarge that jurisdiction. In that case the subject-matter of legislation would have been simply the enlargement of the jurisdiction of the county courts.

But if the recital of the Act had been, "Whereas it is expedient to transfer to the county courts a portion of the jurisdiction of the Admiralty Court to a limited amount," then I feel satisfied that the words, however general, should be read as only including causes within Admiralty jurisdiction. In that case the subject-matter of legislation would have been Admiralty jurisdiction, and the object would be to make the county courts available for the exercise of it to a limited amount. In arriving at a proper conclusion upon the present question, which is no doubt one of much difficulty from loose legislation, we could not take a safer guide than the recital of the first statute, 31 & 32 Vict. c. 71 (which is to be read as one statute with the second 32 & 33 Vict. c. 51), if there were one. But though there is no formal recital, the first enacting clause may, I think, be regarded as having the same effect in shewing what the subject-matter of legislation was. That clause (s. 2) enacts that, if Her Majesty thinks it expedient, she may give the county courts "Admiralty jurisdiction." What does this mean? The natural meaning of it is to give the county courts jurisdiction possessed by the Court of Admiralty; I can give it no other meaning. There is nothing in that Act to give it any other meaning. The use of the words "Admiralty causes" in that Act afterwards does not do so. Indeed, the difficulty does not arise under that Act of Parliament, but under the second Act, as to which it may no doubt be argued that the language of the second section of the former Act is inapplicable. And if it was clear that the whole of the Admiralty jurisdiction was exhausted by the former Act, and that the second, to have any operation at all, must be applied to new and additional subjects of jurisdiction, I should think the argument almost conclusive. But that is undoubtedly not the case. There are subjects included in the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), which are not included in 31 & 32 Vict. c. 71, and upon which the subsequent statute may take effect.

The question before us has formed the subject of two most able

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judgments in the Court of Common Pleas and the Privy Council, *Simpson v. Blues* (1) and *Cargo ex Argos*. (2) It would be impossible to weigh and then correctly balance the strong reasons brought forward in favour of each view. And I have found myself compelled in a case of great difficulty to resort to the simple and well-grounded means of ascertaining what ought to be regarded as the real subject-matter of legislation; and in this way have come to the conclusion that nothing but Admiralty jurisdiction was operated upon.

But I must notice one argument founded upon the 6th section of the first Act, by which the Court of Admiralty may transfer from the county court any Admiralty cause pending there into the Court of Admiralty. This section is no doubt incorporated in the subsequent statute, as was held in *The Swan*. (3) The alternative, then, arises of holding either that the county court only entertains Admiralty causes within the jurisdiction of the Court of Admiralty, or that the Court of Admiralty has indirectly acquired jurisdiction over a new subject-matter. It certainly seems to me that the latter alternative involves a more violent breach of first principles of construction than the former. I only wish further to notice the 6th section of the Admiralty Jurisdiction Act, 1861 (24 & 25 Vict. c. 10), for the purpose of guarding against an argument that the county court has acquired a jurisdiction not possessed by the Court of Admiralty. That section, after giving the High Court of Admiralty a large jurisdiction in claims by owners of any goods carried into any port, adds: "Unless it be shewn to the satisfaction of the Court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." These latter words do not, properly speaking, limit the subject-matter of jurisdiction, but they assume the jurisdiction in the cases provided for, and provide that upon proof to the satisfaction of the Court that the owner is so domiciled, the jurisdiction shall not be exercised. But the Court could only be satisfied by proof given in some cause over which, but for the application of the proviso, it would have jurisdiction. There is nothing, therefore, inconsistent in the county

(1) Law Rep. 7 C. P. 290.

(2) Law Rep. 5 P. C. 134.

(3) Law Rep. 3 A. & E. 314.

court, by means of its process under the 3rd section of the Act of 1869, exercising its jurisdiction when the owner is domiciled in England or Wales, though the Court of Admiralty would not do so.

The conclusion is, that the plaintiff proceeded properly in the Superior Court, and is therefore entitled to his costs.

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BRAMWELL, B. I am of opinion in these cases that, whether we thought the Common Pleas or the Privy Council right, we ought to give judgment for the plaintiffs that they should recover their costs. We are invited to say that they are not entitled to them, because they should have sued in the county court, in which (if they had sued) the Court of Common Pleas have said they would have prohibited them from proceeding. If we were so to hold, it would be ludicrous and a scandal. It is no answer to this to say that the plaintiffs might have got leave to sue in the superior courts. They might, or they might not. But what they are claiming they claim as of right, and not as a matter dependent on the opinion of any superior court as to where the action should be brought.

This being my view, and it being always a matter in which the difficulty might be obviated by leave being granted to sue in the superior courts (which I should think no judge would ever refuse), and it being in the power of the legislature to state what was or is its intention, the subject is perhaps not worth much discussion, with all respect, be it said, to the two great authorities who have differed. But if we are to choose between them, it seems to me that the Court of Common Pleas (1) was right. The difficulties in the way of the decision in the Privy Council (2) are most forcibly put in their judgment; to those are added most cogent arguments in the judgment of the Court of Common Pleas against the expediency of giving Admiralty jurisdiction in such cases as those in question, either to the High Court of Admiralty or the county court. Shortly, the objections are, that on the construction contended for by the defendants, the county court has Admiralty jurisdiction in cases in which the Admiralty Court has no original jurisdiction; that the High Court would have an appellate juris-

(1) *Simpson v. Blues*, Law Rep. 7 C. P. 290.

(2) *Cargo ex Argos*, Law Rep. 5 P. C. 134.



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diction where it has not an original jurisdiction ; that there could be transferred to it from the county court causes which it could not originally entertain, and so it could hear and decide cases not properly within its own jurisdiction or that of the county court. To these objections are to be added, not as aiding the construction of the statute, but as helping to the probable intention of the legislature, the objections, so forcibly stated in the judgment of the Common Pleas, to Admiralty procedure being applied to such cases as those in question.

These different considerations were felt so strongly by the Privy Council that they would perhaps have decided as the Common Pleas did, but for the necessity of finding an application for words for which they saw none if the Common Pleas were right. With great respect, it seems to me a meaning may be given the words without the admittedly preposterous consequences the defendants contend for. The words are, "claim arising out of any agreement made in relation to the use or hire of any ship;" not "claim arising out of any agreement for the use or hire of any ship." I cannot think that the enactment is, in plain and intelligible language, free from any ambiguity. If I found the words without anything to control them, or guide me in their interpretation, I should say they included the cases before us, and much more. But as it is, I declare I do not know what they mean, or were intended to mean. A charterparty is not an agreement for the use or hire of a ship ; but it is said to be included in "claim arising out of any agreement made in relation to the use or hire of any ship." Would that include the ship-broker's claim for finding a charter? see *The Nuova Raffaelina*. (1) Take the next words, "claim arising out of any agreement in relation to the carriage of goods in any ship." Does that include a claim on a policy of insurance? The policy is an agreement, not for, but in relation to, the carriage of goods in a ship. Some restriction must be put on the words. If the ship was in dock, and hired for a dance to be given in the dock, it surely would not be an Admiralty cause. Nor, one would think, would an agreement by the owner of a steamer to take a party to Richmond. Would a ship on Lake Windermere be within the enactment, or a barge on a canal?

(1) Law Rep. 3 A. & E. 483.

Let us read the words thus: "Shall have jurisdiction to try and determine the following causes:—Where the High Court of Admiralty has jurisdiction as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship." Are there such cases? I think there are. The High Court has jurisdiction over any "claim" (the same word) "by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of or from any breach of duty on the part of the owner, master, or crew of the ship." (1) So that the owner of goods carried into any port in England, having a claim for damage to them arising out of breach of contract by the owner of the ship, may sue in the High Court of Admiralty. But the contract broken may be a charter-party, which is a contract in a sense, though not strictly, for the use or hire of a ship. So as to the latter part of the clause, "agreement made in relation to the carriage of any goods in any ship." This would apply to claims by the charterer or shipper under a bill of lading or other owner of goods carried under charter or otherwise.

This construction gives a meaning to the words without the absurd consequences which would follow on the defendants' construction. Therefore these rules should be discharged.

As to the other points arising in one of the cases, viz. that the section as to the costs does not apply where there is judgment by default, and that it does not apply to actions in common law courts, we need express no opinion on them. The arguments presented to us were not presented to the Queen's Bench in the case of *Hewitt v. Cory*. (2) We do not recognise, therefore, that case as an authority against them. It seems preposterous to suppose that the legislature has intended that cases over 300*l.* may be tried either on common law or Admiralty principles, cases under 20*l.* on the same, but cases between the amounts on Admiralty principles only, except at the peril of the plaintiff losing his costs. The difficulty arises from the words "any superior court." Perhaps

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(1) 24 Vict. c. 10, s. 6; see *The Pieve Superiore*, Law Rep. 5 P. C. 482.

(2) Law Rep. 5 Q. B. 418.

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they should be read as "Superior Court of Admiralty, if any." The section supposes that the judge always hears or decides the case, apparently pointing to a court where there is one judge, and where the case is always adjudged.

*Rules discharged.*

*Gunnestad v. Price.*

Attorneys for plaintiff: *Chester & Urquhart.*

Attorneys for defendant: *Scott, Jarman, & Co.*

*Fullmore v. Wait.*

Attorneys for plaintiff: *White & Sons.*

Attorneys for defendant: *Stibbard & Cronshey.*

*Jan. 28.*

GOODWIN *v.* ROBARTS AND OTHERS.

*Negotiable Instrument—Foreign Scrip issued by Agent in England.*

Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment of the instalments, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, is negotiable, and passes by delivery to a bonâ fide holder for value without title.

SPECIAL CASE stated in an action brought to recover the value of Russian and Hungarian Austro-scrip sold by the defendants under the following circumstances.

In 1873 the Russian government, being about to raise a loan on bonds, employed Messrs. Rothschilds, bankers, carrying on business in the city of London, as their agents for that purpose in this country.

In pursuance of this employment Messrs. Rothschild, in December, 1873, issued in London scrip for the loan in the following (printed) form:—

" 1873.

C.

1873.

"Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in 5 per cent. Consolidated Bonds of 1873; negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st December, 1873.

"Scrip for one hundred pounds stock, No. . Received 1875  
the sum of twenty pounds, being the first instalment of twenty per  
cent. upon one hundred pounds stock; and on payment of the re-  
maining instalments at the periods specified, the bearer will be  
entitled to receive a definitive bond or bonds for one hundred  
pounds after receipt thereof from the Imperial Government.

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"London, 1st December, 1873.

"The instalments are to be paid at our office as follows:—

"15*l.* per cent. or 15*l.*, on the 5th February, 1874.

"15*l.* „ 15*l.* „ 9th March „

"20*l.* „ 20*l.* „ 2nd May „

"23*l.* „ 23*l.* „ 9th June „

"Subscribers may pay the same under a discount of 3 per cent.  
per annum on any Monday or Thursday after the 16th instant.

"In default of payment of these instalments at the proper dates  
all previous payments will be liable to forfeiture."

[Here followed receipts (unsigned) for the four other instalments.]

"Imperial Russian Five per Cent. Loan, 1873. 2*l.* 10*s.*

"No.

"On the 1st June, 1874, this warrant for two pounds ten shillings,  
being six months' interest on 100*l.*, will be paid at the office of  
Messrs. N. M. Rothschild & Sons, London."

On the payment of the several instalments the printed receipts  
were signed by Messrs. Rothschild.

The bonds were made and delivered in Russia to Messrs. Roth-  
schild, who, in June, 1874, issued them in London to the holders  
of the scrip. They were in the following form:—

"Imperial Government of Russia,

"15,000,000*l.* sterling,

"In five per cent. consolidated Russian railway bonds.

"Fourth emission.

"Created and issued in conformity with the Imperial ukase of the  
14/26 November, 1873, for the railways, Odessa, &c., redeemable  
by annual drawings in 81 years, on the 19th November (1st De-  
cember) in each year.

"C. No. 100*l.* sterling.

"The bearer of this bond is entitled to 100*l.* sterling, with



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interest at 5 per cent., until the time of the redemption fixed by the drawing, which interest will be paid half-yearly, on the 20th of May (1st June) and 19th of November (1st December) each year, on presentation of the coupons hereunto attached at either of the following places.

“At the office of Messrs. N. M. Rothschild & Sons, in London, in pounds sterling. At that of Messrs. De Rothschild Brothers, Paris, at the exchange of the day at London [and similarly at St. Petersburg, Frankfort-on-the-Maine, Amsterdam, and Berlin].

“The bonds are redeemable at par in 81 years by means of annual drawings at St. Petersburg, commencing on the 19th November (1st December) conformably with the subjoined table of redemption.

“The payment of the drawn bonds will take place six months later, at the same places, and at the same exchange as the coupons.

“Coupons due after the date of the drawn bonds must remain attached thereto, otherwise the amount of missing or unduly received coupons will be deducted from the capital on payment of the bond.

“This bond has forty-two coupons attached for 21 years, and a talon for renewal of the coupons at the expiration of that time. If the bond has not been drawn for redemption, new coupons will be delivered to the bearer without expense on application at London, or Paris, or St. Petersburg, against presentation of the talon.”

[Here followed an enumeration of the bonds to be issued.]

“Agents.—N. M. Rothschilds.”

[Here followed a copy of the ukase of the 14/26 November, 1873, signed by the Emperor of Russia, under which the bonds were issued.]

The Austro-Hungarian scrip was similar in form to the Russian so far as concerned the question between the parties, and was similarly issued by Messrs. Rothschild in London.

In February, 1874, the plaintiff purchased 200*l.* of the Russian, scrip, on which the instalments were fully paid up in advance, and also 300*l.* of the Austro-Hungarian scrip.

On the 27th of February, the broker through whom the plaintiff

purchased the scrip, and in whose hands it had been left to be dealt with as the plaintiff might direct, pledged it with the defendants as security for a loan of 800*l.* then made to him by them. In April he was declared a defaulter on the Stock Exchange, and subsequently absconded and was made bankrupt, and default having been made in repayment of the loan of 800*l.*, the defendants, who were ignorant of the plaintiff's claim, sold the scrip for a sum of 471*l.* 5*s.*

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The case contained the following finding as to usage :—

“The scrip of loans to foreign governments, entitling the bearers thereof to bonds for the same amounts when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and foreign stock exchanges, and through them by the public, for above fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip, and to advance loans of money upon the security of it, before the bonds were issued, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument transferable by delivery ; and this usage has always been recognised by the foreign governments and their agents delivering the bonds when issued to the bearers of the scrip. This usage extended alike to scrip issued abroad by foreign governments and scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it.”

The question for the opinion of the Court was, whether the defendants were, as against the plaintiff, entitled to the said scrip and the proceeds thereof.

Jan. 27. *Benjamin, Q.C.* (*Anstie* with him), for the plaintiff. The scrip held by the plaintiff was not negotiable paper in a legal sense, that is, so that the property in it would pass to a *bonâ fide* holder for value by delivery without title. It is neither a bill of exchange nor a promissory note, but merely an obligation on Messrs. Rothschild to deliver to the subscriber, on payment of the instalments by him, bonds of the Russian government to a like

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amount, provided the Russian government shall have delivered those bonds to them. The instrument is issued in England by bankers residing here; it does not come into England as a document existing abroad and bearing in the place of its issue the character of negotiable paper; and the question, therefore, is, whether it is in the power of bankers and financiers here to create a new species of negotiable paper without the authority of Parliament. In *Dixon v. Bovill* (1), in the case of iron warrants, it was decided, on general principles equally applicable to this case, that it was not possible by the custom of the market to create new classes of negotiable instruments.

[BRAMWELL, B. Does this scrip contain any promise or engagement by Messrs. Rothschild?]

It contains no statement or promise except by them. The Russian government is no doubt engaged to Messrs. Rothschild, but it is not engaged to the public; it is only hereafter to become engaged to them by the issue of the definitive bonds. Messrs. Rothschild are to be the agents of the Russian government in distributing the bonds when they arrive; in the meantime they themselves issue the scrip and sign the receipt, not signing as agents, and by the terms of it engage that if the Russian government provides them with the corresponding bonds, they will issue them to the lawful holders of the scrip. This distinguishes the case from *Gorgier v. Mievill* (2), which was the case of a definitive bond, signed by the King of Prussia and issued in Prussia, and which came to England with the character of a negotiable instrument. The scrip here is no more equivalent to such a bond than an undertaking to give a bill of exchange is equivalent to a bill of exchange. It stands on no higher footing than other paper issued in England, and treated in the market as negotiable, though not such by law, and is entirely within the decision of the Court of Queen's Bench in *Crouch v. Crédit Foncier*. (3)

*Brown, Q.C.* (Robarts with him), for the defendants. *Crouch v. Crédit Foncier* (3) is no authority in the present case, for this is not an English instrument, but is an instrument issued by a foreign sovereign through his agent in England, and negotiable all over

(1) 3 Macq. 1.

(2) 3 B. &amp; C. 45.

(3) Law Rep. 8 Q. B. 374.

Europe. It is not, in fact, distinguishable from the foreign bonds which were treated as negotiable in *Gorgier v. Mieville* (1) and *Attorney-General v. Bouwens*. (2) The scrip shews, on the face of it, that Messrs. Rothschild assume no personal responsibility, but act only as the agents of the Russian government. It is in that capacity that they sign the receipts for the instalments, and there are no words of contract in the instrument. Agents acting for a foreign government are not personally liable: Story on Agency, §§ 302, 303, 304; the contract is with the foreign government only. The whole transaction, the scrip not less than the bonds to which the scrip is only preliminary, is founded on the ukase of the Emperor of Russia, and the instrument is not an English, but a Russian instrument. The scrip cannot, therefore, properly be described as a chose in action, which signifies a contract which can be enforced by action or suit: Williams on Executors and Administrators, 7th ed., vol. i. p. 784; for there is no person against whom it could be enforced, either at law or in equity: *Duke of Brunswick v. King of Hanover* (3); *De Haber v. Queen of Portugal*. (4) It is, in substance and fact, the instrument of a foreign government, and as such forms, by general mercantile usage, a part of the currency of Europe: *Lang v. Smyth* (5); *Wookey v. Pole* (6); *Miller v. Race* (7); *Mercer County v. Hackett*. (8)

[BRAMWELL, B. That case seems directly contrary to *Dixon v. Bovill*. (9)]

*Benjamin, Q.C.*, in reply. This is a contract made in London, and to be executed in London, and is, therefore, an English contract. The cases referred to were all cases of promises to pay money; this is only an undertaking to deliver a bond, when it is provided. Whatever might be the case, if the scrip were really issued abroad, it can no more be in the power of a foreign government (even assuming this to be the act of a foreign government) than of a private person to issue in England, as negotiable paper, paper which is not by the law of the country negotiable.

*Cur. adv. vult.*

(1) 3 B. & C. 45.

(2) 4 M. & W. 171.

(3) 2 H. L. C. 1.

(4) 17 Q. B. 171; 20 L. J. (Q.B.) 488.

(5) 7 Bing. 284.

(6) 4 B. & Ald. 1.

(7) 1 Sm. L. C. (6th ed.) p. 468.

(8) 1 Wallace, R., 83, at p. 95.

(9) 3 Macq. 1.



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Jan. 28. BRAMWELL, B. This case, which was argued before us yesterday, was said, and said truly, to raise a very important question. Scrip of this nature is dealt with to the extent of millions, and no doubt the question is of importance, not only as between buyers and sellers, but also to those foreign governments who wish to raise money, and to those who raise it for them in this country. But I think it is quite clear what our decision should be. The case of *Gorgier v. Mieville* (1) is in force, and not overruled; and it was there decided, in the case of a Prussian bond, that a bonâ fide holder for value was entitled to it as against a rightful owner from whom it had been stolen, or who had been wrongfully deprived of it. It was therefore admitted in this case, and could not be denied, that if this had been a bond, the defendant would have been entitled to our judgment; but it was said that, this being scrip, it would be otherwise. In the judgment of Abbott, C.J., in *Gorgier v. Mieville* (1), he states it as the reason of his decision that, by the course and practice of the market, of the people who buy and sell and deal in, and are interested in and are liable upon, the bonds in question, the property in them passes by delivery to a bonâ fide holder for value. As far as one can see, that is a reason of general application. But no doubt Mr. Benjamin has a right to argue that, although the Court put no qualification on that general reason, yet they must be taken to be applying it to the case they were dealing with—that is, the case of a bond; and that the subsequent case of *Crouch v. Crédit Foncier* (2) shews that an engagement to pay money to bearer, not entered into by a promissory note or a bill of exchange, is not transferable from hand to hand so as to give a title to the person who receives it, although he takes it for valuable consideration, as against one who had been deprived of it, and that the law does not allow the effectual creation of such instruments as negotiable instruments; that such an instrument is no more in the situation of a bond than an engagement or undertaking to give a promissory note is in the situation of a promissory note; and that, as an undertaking to give a promissory note could not be made transferable from hand to hand, either by practice or custom, neither can an instrument of this nature be made so transferable.

(1) 3 B. &amp; C. 45.

(2) Law Rep. 8 Q. B. 374.

But that argument is made on the assumption that Messrs. Rothschild are here the contracting parties. Now, I am clearly of opinion that they are not, and that they enter into no contract. They are the mere agents for the negotiation of the loan, or so much of it as is negotiated in London; another firm of Messrs. Rothschild being agents for the negotiation of the loan in Paris. In my opinion, they do not undertake that the bonds shall be delivered. They do not undertake even that if the bonds come to England they shall be delivered. They do not undertake the payment of interest. They do not undertake any obligation of any sort or kind. They simply receive the money for the Russian government from the parties who subscribe the loan, and who hold these documents, having no rights against the Messrs. Rothschild, but having rights, such as they are, against the Russian government only.

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Being of that opinion, I am of opinion that this scrip is as much a Russian instrument as the bond itself would be. And I confess it appears to me shocking to one's common sense to hold that this thing, whatever it is called, which will result in a bond, which is a sort of interim bond, which is something preparatory to a bond being given, which is of a temporary character and is to terminate in a bond, is itself in a plight different as to negotiability from that which the bond would be in. It would be drawing a distinction which would be utterly unintelligible to the commercial world at large. I can see no ground for such a distinction, and therefore, on the ground that *Gorgier v. Mieville* (1) shews that if this had been a Russian bond the defendants would have been in the right, and that to my mind this instrument is as much a Russian instrument as a Russian bond would be, I think that what would be true of the bond is true also of the scrip, and that the defendants are therefore entitled to our judgment.

If *Gorgier v. Mieville* (1) did not exist, the topics which have been urged upon us as to the locality of the contract, and the power of the Emperor of Russia to make an instrument negotiable here, might be very properly discussed; but as that case is an existing and binding authority, it is conclusive upon these matters,

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and the only question is whether you can distinguish between the bond and the scrip.

One other observation I will make. It is manifest on the finding of this case that when the scrip is taken to Messrs. Rothschild, or (I ought perhaps to say) to the Russian government, they undertake that they will give to the holder of the scrip a bond; and I understand, from the statement of the facts, that if the plaintiff were to go to them and say, "Do not give it to the defendants; give it to me, because I am the rightful owner of the scrip," they would refuse to do so. They would say, "No; we shall recognise the bonâ fide holder for value, whoever he may be." If that is so, it seems to me to be extremely difficult to say that the documents can be intercepted in anybody's hands in the meanwhile. I think our judgment must be for the defendants.

CLEASBY, B. I am entirely of the same opinion. And I might leave the case on the grounds so clearly stated by my Brother Bramwell; but I should like to add a few words on what I consider to be the nature of these instruments. They emanate from the government of Russia, and to understand the matter I think we must go back to the ukase of the Emperor. It appears from that document that money is wanted for the construction of railways, and that for that purpose it is necessary to raise a loan of 15,000,000*l*. It is stated that subscriptions will be opened, and this loan, when contracted, will be met by bonds. The loan is contracted on this footing, that the persons, whoever they may be, holding these documents shall, if the Russian government keeps faith with them, receive bonds on payment of their subscriptions by instalments at stated times, under which they will be entitled to receive payment at the times and according to the drawings specified in the bonds. The bond is then the document of title for a part of the loan. It is not money. The value of it depends on the manner in which the Russian government keeps faith with the subscribers. It is really the document of title by virtue of which persons can go to the Russian government and receive (if the Russian government keeps faith with the public) certain payments.

That being the nature of the bond, in what respect does this other document differ from it? Is it not the title by virtue of

which the person holding it, according to the terms of it, can call upon the government of Russia to give him the title to the money, that is, to give him the bond? The bond is not the money, it is only the title to the money. This document is founded upon the same idea, that the Russian Government will keep faith and give to the holders of these documents, according to its terms, the benefit which it holds out to them. It is, therefore, the document of title issued by the Russian government as binding upon them, and, as in the case of the bond, they make the bearer of it entitled to payment. The heading of the document is sufficient to indicate its nature. "Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in Five per Cent. Consolidated Bonds of 1873." It is true that Messrs. Rothschild have signed the document on their own behalf; but as soon as they have signed the first receipt, it is authenticated by them as the document of the Imperial government of Russia, and that is, in my opinion, the only effect of their signature. The bonds are authenticated by the signature of the Emperor himself. What is this scrip, then, but the act of the Russian government? So it becomes a document of title by which the bearer is entitled to the repayment of certain money advanced, and it has, in my opinion, precisely the same character as the other. But for the advantage which the public receive of making the loan by instalments, there is no necessity for the scrip at all; and the moment the first instalment is paid there is no obligation on any one to pay another, and there may be an end of the transaction. It is issued by the Russian government as a document of title, and by which the person holding it is not only to receive a bond, but is entitled to receive money just as much as he is entitled to receive it on the bond itself, for there is at the foot of the scrip the entry, "On the 1st of June, 1874, this warrant for 2*l.* 10*s.*, being six months' interest on 100*l.*, will be paid at the office of Messrs. Rothschild & Sons, London." Therefore, when the matter is really looked at, it is impossible to make any sound distinction between the bond and the scrip; they both represent a title to receive money from the Russian government. We have, then, a clear guide in *Gorgier v. Mieville* (1), and there is nothing in the case of *Crouch v.*

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*Crédit Foncier* (1), or in *Dixon v. Bovill* (2), to conflict with our decision.

*Judgment for the defendants.*

Attorney for plaintiff: *J. B. Batten.*

Attorney for defendants: *J. H. Mackenzie.*

Feb. 10.

[IN THE EXCHEQUER CHAMBER.]

LEWIS v. DAVIS.

*Penal Action—Clerk of Justices—Taking Fee other than that in authorized Table—26 Geo. 2, c. 14—Table of Fees not made at Sessions next after June, 1753—Venue, when local—Action as Informer by Person grieved—31 Eliz. c. 5—21 Jac. 1, c. 4.*

In an action, under 26 Geo. 2, c. 14, s. 2, to recover penalties against a clerk of justices for taking a fee higher than that in the authorized table, the venue is local, under 31 Eliz. c. 5, though the plaintiff happen to be the person grieved.

Declaration (venue Middlesex) that a table of fees to be taken by the clerks of justices for Monmouthshire directing that the fee to be taken for every recognisance to prosecute, &c., should be 4s., was, pursuant to 26 Geo. 2, c. 14, made and settled by the justices at quarter sessions, approved at the quarter sessions next succeeding, and afterwards laid before the judges at the next assizes, who, on November the 15th, 1842, approved and ratified the same, and that three months afterwards the defendant, as clerk to the justices, demanded and received of the plaintiff 8s., as the fee for taking and acknowledging a recognisance, whereby, and by force of the statute, the defendant became liable to pay the plaintiff 20l. :—

*Held*, on demurrer, that the declaration was bad, as the Act 26 Geo. 2, c. 14, s. 2, in imposing a penalty of 20l. for demanding a greater fee than that established, enabled any person to sue as informer, and the plaintiff sued as informer, though he happened also to be the person grieved.

By 26 Geo. 2, c. 14, s. 1, “the justices of the peace throughout England, at their respective general quarter sessions of the peace, to be held next after the 24th day of June, 1753, shall and they are required to make and settle a table of fees, &c. And it shall and may be lawful for the said justices in their respective quarter sessions assembled from time to time to make any other table of fees to be taken instead of the fees contained in the table.”

*Semble*, per Blackburn, Mellor, and Archibald, JJ., that ‘the power to make a fresh table of fees does not depend upon a previous table having been made at the sessions next after June, 1753.

DECLARATION (venue Middlesex) that a certain table of the fees to be taken by the clerks of justices of the peace within

(1) Law Rep. 8 Q. B. 374.

(2) 3 Macq. 1.

and for the county of Monmouthshire, directing that the fees to be taken for every recognisance to prosecute or answer or be of good behaviour, inclusive of notice, be the sum of 4s., was, pursuant to 26 Geo. 2, c. 14, made and settled by the justices of the peace for the county, at a general quarter sessions in and for the county, and was afterwards approved at the general quarter sessions of the peace in and for the county next succeeding and afterwards, at the assizes holden in and for the county next after the general quarter sessions, at which the same was so approved, was laid before the judges of assize, who, on the 15th of November, 1842, approved, ratified, and confirmed the same, which then became and was of validity and effect within the county; and that, after the space of three calendar months from the 15th of November, 1842, when the table of fees was made and ratified, the defendant, then being and acting within the county as clerk to the justices of the peace in and for the county, under the pretence of the taking and acknowledging of a certain recognisance taken and acknowledged before the justices at a general quarter sessions in and for the county, by E. Lewis and J. M. W. Lewis and A. Adams, her sureties, in the sum of 10*l.* each, conditioned for the appearance of E. Lewis, to answer further to a charge of larceny, demanded and received of the plaintiff the sum of 8*s.* as and for the fee due and payable by the plaintiff to the defendant, for the taking and acknowledging of such recognisance, which sum of 8*s.* was another or greater fee than at the time of such demanding and receiving, was ascertained, ratified, and confirmed in manner directed by the statute, whereby, and by force of the statute, the defendant forfeited and became liable to pay to the plaintiff for his offence the sum of 20*l.* [There were two other counts in a similar form.]

Demurrer and joinder in demurrer.

The demurrer came on for argument in the Court of Exchequer in Easter Term, 1874, when the Court gave judgment for the defendant, no counsel appearing on behalf of the plaintiff. The plaintiff brought error.

Feb. 10. *Poland* (*Aspland* with him), for the plaintiff. The declaration is good. The objection stated in the margin of the

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demurrer is, that it is not shewn that a valid table of fees was in force at the time of the receipt of the money by the defendant. The question, therefore, is, whether the table of fees stated in the declaration to have been made in 1842, is good within the Act 26 Geo. 2, c. 14. (1) It will be contended that, on the true construction of the Act, if the justices omit to make their table of fees in the year 1753, they can never make it afterwards. But the words of the Act as to this date are directory only. In *Bowman v. Blyth* (2), a table of fees had been made at the June quarter sessions, submitted for approval to the next October quarter sessions, and then adjourned for consideration to the January sessions, at which it was

(1) 26 Geo. 2, c. 14, s. 1: "The justices of the peace throughout England, at their respective general quarter sessions of the peace to be held next after the 24th day of June, 1753, shall and they are hereby required to make and settle a table of the fees which are to be taken by clerks to justices of the peace, and such tables, being approved by the justices of the peace at the next succeeding general sessions of the peace, with such alterations as such justices so assembled shall think proper, shall be laid before the judges at the next assizes, and the said judges are authorized and required to ratify and confirm such tables in such manner and form as the same shall be made, settled, and approved of by the said justices, or with such alterations, additions, or abatements as to such judges shall appear just and reasonable." The section then proceeds to authorize the "justices of the peace in their respective quarter sessions assembled from time to time to make any other table of fees to be taken instead of the fees contained in the table which shall have been ratified and confirmed by the judges of assize, and after the same shall have been affirmed by the justices of the peace at the next succeeding general quarter sessions, in manner as aforesaid, to lay such new table of fees

before the judges at the next assizes, who are hereby empowered and authorized to approve and ratify the same in manner as aforesaid, if they think fit; but no table of fees to be made and settled by the respective justices of the peace shall be of any validity or effect whatsoever until the same shall be ratified and confirmed by the said judges."

By s. 2: "If at any time after the space of three calendar months from the time that such table of fees shall be made and ratified as aforesaid any clerk or clerks to any justice or justices of the peace, or any person or persons acting as such, shall, under pretence of any matter or thing done, transacted, or performed by such justice or justices in the execution of his or their office or offices, or done, transacted, or performed by such person or persons as clerk or clerks to such justice or justices, demand or receive any other or greater fee than shall have been ascertained, ratified, and confirmed in manner as aforesaid, such person shall for every such offence forfeit and pay twenty pounds to any person who shall sue for the same by action of debt, &c., in any of His Majesty's courts of record at Westminster," &c.

(2) 7 E. & B. 26; 26 L. J. (M.C.) 57.

approved of, and afterwards ratified and confirmed at the following assizes, on the 5th of April, 1838. It was held that the table was not duly approved, as the approval ought to have been given at the October sessions, and they had no power to adjourn the consideration of the matter; but Lord Campbell, in giving judgment, says (1): "The result is, that there is no table of fees now in force in Norfolk, and a new one must be made," shewing that, in his opinion, the statute did not require that the table should be made not later than 1753. It is quite reasonable that, where there has been a delay in considering the fees, the matter should be commenced *de novo*, and that the sessions, when they have once started, should not be allowed to go on adjourning the consideration of the amount of the fees, until the interest in the subject has died out. But it is not material that the sessions should commence in any particular year. It cannot be supposed that if the sessions throughout England did not exercise this power in 1753, all the tables of fees are invalid.

[He then referred to several other objections to the declaration, which were overruled by the Court, as being only matters for special demurrer.]

Lastly, it is said, that the venue ought to have been local. This point raises the question, whether the Act 31 Eliz. c. 5 (2) applies to an action, like this, by the party grieved. That Act is only directed against common informers. Here the plaintiff is the party grieved. In *Fife v. Bousfield* (3) it is expressly laid down on the authority of *Allen v. Stear* (4) and *Calliford v. Blaw-*

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(1) 7 E. & B. 46; 26 L. J. (M.C.) 61.

(2) By 31 Eliz. c. 5, "An Act concerning Informers," it is enacted (s. 2) "In any declaration or information at any time after twenty days after the end of this session of parliament to be had, brought, sued, or exhibited, the offence against any penal statute shall not be laid to be done in any other county, but where the contract or other matter alleged to be the offence was in truth done."

By 21 Jac. 1, c. 4, s. 2, "In all informations to be exhibited, and in all

bills, counts, plaints, and declarations in any action or suit to be commenced against any person or persons either by or on the behalf of the king, or any other, for or concerning any offence committed or to be committed against any penal statute, the offence shall be laid and alleged to have been committed in the county where such offence was in truth committed, and not elsewhere."

(3) 6 Q. B. 100.

(4) Cro. Eliz. 645.



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*ford* (1), that the statute of Elizabeth applies to common informers only, and not to a party grieved; and that the effect of 21 Jac. 1, c. 4, s. 2, is to re-enact the provisions of 31 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of any objection as to the venue.

[BLACKBURN, J., referred to *Dyer v. Best* (2), where it was held that the statute of Elizabeth applies to a person suing for a penalty for himself alone in the same manner as though he sued as an informer *qui tam*.

DENMAN, J. You claim in your declaration "by force of the statute."]

If the plaintiff, though a common informer, happens to be the person grieved, the Act does not apply.

[LUSH, J. The defendant might have pleaded the pending of another action by a common informer for the same offence. Does not "party grieved" mean the party grieved according to the provisions of the legislature? Here the statute does not create a party grieved.]

*Lane* (*H. Mathews, Q.C.*, with him), for the defendant, was not heard.

BLACKBURN, J. I think we need not trouble the counsel for the defendant, as the point now before us is quite clear. The statute 31 Eliz. c. 5, s. 2, says, in as plain words as can be, that an offence against any penal statute shall not be laid to be done in any other county but where the contract, or other matter alleged to be the offence, was in truth done. Here the offence is created by the Act 26 Geo. 2, c. 14, s. 2, and by that section an action is given to any person to recover a penalty of 20*l.* against any one who demands a greater fee than that which is established. And we find that the venue is laid in Middlesex, though the offence was committed in Monmouthshire, and the venue ought, therefore, to have been there. Now, it is quite true that there have been decisions to the effect that where a penalty is expressly given by statute to the party grieved, such party is not within the statute of Elizabeth. We need not consider whether at the present day the Exchequer Chamber would follow these decisions. Here the penalty

(1) 1 Show. 353.

(2) Law Rep. 1 Ex. 152.

is given to the informer only, and it would be an anomaly if the venue should not be local if the informer should happen to have a grievance, and that the rule should be different where he had none. This point is sufficient to dispose of the case. We give no decision on the first point, as to whether it is necessary under the Act that a table of fees should be first made and settled in 1753. I should have wished to hear the counsel for the defendant on this point, and I have had a great deal of doubt as to whether the power from time to time to make any other table of fees instead of the table confirmed by the judges of assize, may be exercised where no table was made in 1753. But I am at present inclined to think that these words may very well mean that the justices shall have power to make a fresh table of fees at any time after the year 1753, and that it was not meant to make the exercise of the right in that year a condition precedent to its exercise thereafter. This is the inclination of my opinion, but, of course, it might have been changed by the argument on the other side.

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MELLOR, J. I am of the same opinion. With regard to the question as to the exercise of the power to make a table of fees, I think this case is distinguishable from *Bowman v. Blyth* (1), where the question was whether the sessions, to whom the table was submitted for approval, had power to adjourn the consideration of it to the next sessions. I think that the Act only intended to prescribe generally the steps for making fresh fees in substitution for those which existed, and did not contemplate any particular year. This opinion is, of course, no part of our decision, but I think it right to express it.

LUSH, J. I concur in the opinion of my learned Brothers as to the necessity of the venue being local. The statute of Elizabeth applies to all common informers, whether they are parties grieved or not.

GROVE and DENMAN, JJ., concurred.

ARCHIBALD, J. I am of the same opinion. The statute of Geo. 2 does not create any grievance, but gives a right to any

(1) 7 E. & B. 26; 26 L. J. (M.C.) 57.

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person to sue for the penalty. As to the other point, my present opinion is that it is not essential that a table of fees should have been made at the sessions first held after June, 1753.

*Judgment affirmed.*

Attorneys for plaintiff: *Clennell & Fraser.*

Attorneys for defendant: *Few & Co.*

Feb. 11.

[IN THE EXCHEQUER CHAMBER.]

MILL v. HAWKER AND OTHERS, AND WICKETT.

*Trespass—Highway Board—Individual Corporators—District Surveyor—  
Personal Liability—5 & 6 Wm. 4, c. 50, 25 & 26 Vict. c. 61.*

At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which the defendants justified, Kelly, C.B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was therefore given in support of the plea of justification. The Court of Exchequer (Kelly, C.B., dissenting) having set aside the nonsuit and ordered a new trial on the ground, first, that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:—

*Held*, by the Exchequer Chamber (expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed.

APPEAL by the defendants from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit. (1)

The facts are fully stated in the report of the case in the Court below, and may be sufficiently understood from the head-note to the present report.

Feb. 10, 11. *Kingdon, Q.C. (Lopes, Q.C., and Pinder with him)* for the defendants. First, the defendants, who are members of the

(1) Law Rep. 9 Ex. 309.

highway board, are not personally liable. [It is unnecessary to refer to this part of the argument, as no judgment was given on the point.] Secondly, Wickett, the surveyor of the highway board, is not liable. By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 16, it is enacted that the surveyor "shall in all respects conform to the orders of the board in the execution of his duties." He is therefore bound to obey the commands of the board, and his position is analogous to that of a bailiff or other officer executing the process of a court of justice. It has always been held that such an officer may in an action of trespass justify under the process of the court, though it had no foundation in point of fact: *Dews v. Riley* (1); *Andrews v. Marris*. (2) The surveyor is a public officer acting for a public body.

[BLACKBURN, J. The Chief Baron having nonsuited the plaintiff, I think we must assume that the path in question was not a highway. It follows that the board acted without jurisdiction. And though the surveyor must obey the board, it is "in the execution of his duties."]

The immunity of a judicial officer does not depend upon the process being within the jurisdiction of the Court: *Moravia v. Sloper*. (3) Under s. 17 of the Act the board are to keep in repair the highways within their district. It is therefore for the board to determine, as between themselves and their officers, which are the highways. The surveyor cannot inquire whether any order given to him is legal or not.

[BLACKBURN, J. He has two courses. He can insist upon an indemnity before acting, or he may require the board to have recourse to legal process.]

It is unreasonable to require that the surveyor should be satisfied that any act which he is called upon to perform is within the jurisdiction of the board; it is enough that it is apparently within their jurisdiction.

*Arthur Charles* (*H. T. Cole, Q.C.*, with him) first argued the question as to the personal liability of the members of the board. Secondly, with regard to the surveyor, he is liable as the hand which did an illegal act. The Act 5 & 6 Wm. 4, c. 50, ss. 69,

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(1) 11 C. B. 434; 20 L. J. (C.P.)  
264.

(2) 1 Q. B. 3.

(3) Willes, Rep. 30.



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73, 74, contains provisions which shew that in the case of supposed obstructions to a highway, it was intended that the surveyor should not act *mero motu*, but should make complaint to the justices. The defendants' argument upon s. 16 of the later Act must go the length of saying that the surveyor must accept the orders of the board, no matter what they are. The case has no analogy with that of the execution of process by officers of courts of justice. It is subject to the ordinary law of master and servant.

He also repeated the arguments urged in the Court below.

*Kingdon, Q.C.*, in reply.

BLACKBURN, J. This action was brought against several defendants, one of whom was the surveyor of the highways and the others members of the highway board, which is made a corporation by the late statute. The Lord Chief Baron at the trial decided, for reasons which I will consider presently, that the action would not lie against either of the defendants—neither against the surveyor nor the rest; and he directed a nonsuit, the question as to whether the place in dispute was a highway not being discussed. Upon application to the Exchequer, the majority of that Court (the Lord Chief Baron dissenting) set aside the nonsuit, and ordered a new trial on two distinct grounds. They thought the Chief Baron wrong in saying that the surveyor was protected, and that no action would lie against him, and that he was also wrong in saying that no action would lie against the corporators. Now, the appeal before us is from that decision; and we are all of opinion that, as regards the surveyor, the nonsuit was wrong, and that the rule ordering a new trial was right. And inasmuch as it was one nonsuit, where the parties were sued together in a single action, the decision that the nonsuit was improper as regards one, sets it aside as regards all, and consequently the judgment making the rule absolute must be affirmed. In arriving at this conclusion we proceed upon the ground that the surveyor was clearly liable.

Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. If it were neces-

sary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous. Our decision would be of no assistance in sending the case down to trial, and would perhaps be an embarrassment to the learned judge who may have to try it. We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before, no better and no worse. On the new trial the facts will be ascertained, and the point reserved in such a manner that the Court before which it comes will be much better able to deal with it than they would be if they were to consider it now.

I will now shortly give my reasons for thinking that the surveyor is liable; and in stating those reasons I believe that I express the opinions of all the judges. If the board had authority given to them by the statute to determine whether a disputed highway was a highway, and consequently were authorized to break into a close where they supposed that there was a highway, but where there was not a highway, though they honestly and *bonâ fide* believed there was; if there had been any such authority given to them, and if the surveyor was acting under their orders, I should apprehend that he would be protected. Sect. 16 of 25 & 26 Vict. c. 61, enacts that "the district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect or to be performed by the board." If the board had authority given to them to enter into a close where there was no highway, but where they really believed there was a highway, and they directed their surveyor to go there, that would be a duty in which the surveyor would be directed to act. But then the section goes on—"and he shall in all respects conform to the orders of the board in the execution of his duties." If the statute said to a man, "You are to obey the orders of a particular person," it would be very hard to punish him if he did not obey those orders, and at the same time to make him liable if he did obey them. But when you come to look at the matter, the board must have some power or duty to order what is to be done, and the surveyor, who is to do it for them, is to obey their directions. The Act does not say that when the board think

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that they have an authority, but have not that authority, that the surveyor is to act upon their directions, and, consequently, that while acting on their directions he is to be protected.

Now, as to the question whether any jurisdiction or authority is given to the ancient surveyor of highways, and to the highway board which is substituted for him, to break into a close which is private property, but where they think there is a highway, one is somewhat embarrassed through not knowing on what ground the board believed this path to be a highway. No board has power to decide whether a certain way is a highway; but they may, if they like, or anybody may, if he likes, raise the issue at common law and have it decided. There are provisions in this statute under which the question whether a certain place is a highway may be brought before the justices for decision, but there is no power for any board or other officer to decide it. Any one acting upon such a decision, does so at his peril. Mr. Kingdon endeavoured to point out some section which gave this power. I can see none. Mr. Charles argued that even if it had been a highway, the surveyor had no right to remove the obstruction. How that would be I do not say; it is not the question here. We must, in favour of the plaintiff, assume that if he had not been stopped he would have proved that this was not a highway; and if he had proved that it was not a highway, the question whether the surveyor would have the right to remove an obstruction across a real highway, would not have arisen. Here a gate on a close, which has not been proved to be a highway, has been broken through, and there is no clause in the Act of Parliament which says that this can be done. It does not give the board a right to remove something from that which is not a highway, but which they think is a highway. If this be the case, the ground on which the Chief Baron held that the surveyor was not responsible, seems totally to fail. The exception is only that of people acting for courts of justice, or perhaps where any Act of Parliament says that they must in all events obey. But it certainly does not apply to such a case as the one before us, where the Act only says that the surveyor shall obey lawful orders. For these reasons I think that the judgment of the Court below ought to be affirmed; but we must only be taken to add the confirmation of a court of appeal to

that part of the judgment which proceeded on the ground that the surveyor was liable.

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MELLOR, J. I am of the same opinion. I think the true limit of the surveyor's obedience is while the board is acting legally, not when it is acting illegally. Where he is protected from the consequences of any act, the board are protected, but if the board order him to do anything which it is beyond their power to order, then I take it that he is no longer protected. I take this to be the meaning of s. 16, and I agree that the judgment of the Court below, so far as the surveyor is concerned, should be affirmed.

LUSH, J., concurred.

GROVE, J. I also agree in the opinion which has been expressed. It is admitted for the purposes of this part of the case that the board is liable in its corporate capacity for an act which, for the purposes of the case, is admitted to be unlawful; and here the surveyor commits that unlawful act, for which he should be held legally responsible. Therefore the whole question—for no other question has been brought to bear upon the matter—is whether by s. 16 he is exempted from that liability. [The learned judge read the section.] It seems to me that it would be straining the Act to say that the section actually exempts the surveyor from all legal liability. If the rendering which is contended for by Mr. Kingdon were adopted, it would virtually give him such an exemption, for I do not see any words in the section which would limit that exemption. But I see nothing to give it a wider limitation than that of things lawfully ordered by the board. It is confined to carrying into effect the duties by the Act required. No case has been cited by Mr. Kingdon in support of his argument except the case of officers executing legal process, and acting in the execution of duties conferred upon them by courts of law. This seems to me to shew that the exemption claimed here is not an exemption which would be likely to exist, for if it had we should probably have had some cases more expressly in point. I think I ought to add that I have entertained some doubt as to whether the Court ought not to have given judgment on both points, but that doubt is not sufficient to



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induce me to differ from the rest of the Court, more especially as the Court will be in fuller possession of the facts after the trial.

DENMAN, J. I am of the same opinion. The question as to the liability of the surveyor seems to me to depend entirely on the words of 25 & 26 Vict. c. 61, s. 16, and the words relied upon by Mr. Kingdon are these:—"He shall in all respects conform to the orders of the board in the execution of his duties." To ascertain the real meaning of these words we must go to the earlier part of the clause, which says: "he shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect, or to be performed by the board." What are those duties? They are duties relating entirely to public highways, and for the purposes of this case we are bound to assume that the particular place in which the surveyor attempted to execute his duties on the occasion complained of, was a place which was not a public highway. If so, I think it follows from the reasons given by my Brother Blackburn, that the board had no jurisdiction over that place. Then, if the board had no right to do what they did, had the surveyor any right to act under their authority in the manner complained of? Well, the words are, "he shall in all respects conform to the orders of the board in the execution of his duties." If this was not a highway, he would have no duties there at all, and he cannot therefore resort to this clause as affording him a protection. The cases relied upon have been cases of a peculiar kind. The case of *Dews v. Riley* (1), and the case of *Andrews v. Marris* (2), the only two which told in favour of Mr. Kingdon, were cases relating merely to duties performed by officers under the orders of a court of justice. These cases are not applicable to the present case, but the general rule is applicable, that a man who has done a wrong is responsible for that wrong. Here the surveyor has done an act upon an object with which he had no duty to interfere. Therefore he, at all events, is responsible.

With regard to the question as to the corporators being personally responsible, I think that is a matter of great difficulty, and that it would be better not to send down the case with a divided

(1) 11 C. B. 434; 20 L. J. (C.P.) 264.

(2) 1 Q. B. 3.

opinion, or, by taking time to consider, to prevent the case from being tried at the next assizes.

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ARCHIBALD, J. I entirely agree as to the inexpediency of taking time to consider the question as to the personal liability of the corporators, as to which there may probably be some difference of opinion. As regards the surveyor, it appears to me that the effect of s. 16 is to make him the executive of the board, and any orders which he may receive to carry out their lawful duties, are orders which he ought to obey. If they go beyond this limit he ought not to obey them, and would not be justified in obeying them. Here it is admitted that the spot in question was not a highway ; and nothing has been cited to shew that the board would be justified in committing a trespass upon land which is not a highway. Consequently, this was no part of their duties ; and I think it was no part of the duty of the surveyor to obey their orders to commit that trespass. For these reasons I agree that the judgment of the Court below on this point should be affirmed.

*Judgment affirmed as regards the liability of  
the surveyor.*

Attorneys for plaintiff: *Pattison, Wigg, & Co., for White & Dingley, Launceston.*

Attorneys for defendants: *Coode, Kingdon, & Cotton, for Hawker, Boscastle.*

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[IN THE EXCHEQUER CHAMBER.]

RADLEY AND ANOTHER *v.* THE LONDON AND NORTH WESTERN  
RAILWAY COMPANY.*Contributory Negligence—Railway Bridge.*

The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' empty trucks from their line, the plaintiffs removing them as they thought fit. The defendants were accustomed to bring such empty trucks along their main line at any hour by day or night, and, without notice to the plaintiffs, to shunt such trucks on to the siding and leave them there to be disposed of by the plaintiffs. One Saturday evening, after working hours, the defendants brought on to the plaintiffs' siding and left there trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at the plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs which pushed the loaded truck up to the bridge, by which means the further progress of the train of trucks was checked. The engine-driver, believing that the obstruction was caused by a break, drew back the engine, and gave with it such a push to the train that the loaded truck knocked down the bridge. In an action for the damage so done, the jury found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck :—

*Held*, by the majority of the Exchequer Chamber (Denman, J., dissenting), reversing the decision of the Court of Exchequer, that there was evidence of contributory negligence to go to the jury.

APPEAL by the defendants from a decision of the Court of Exchequer making absolute a rule for a new trial on the ground of misdirection, and that there was no evidence of contributory negligence to go to the jury. (1)

The cause was tried at the Liverpool Summer Assizes, 1873, before Brett, J., when the following facts were proved :—

The plaintiffs are colliery proprietors owning and working the Sankey Brook Colliery, close to which there was a mineral branch of the defendants' railway called the Parr Branch.

In connection with the Parr Branch there are certain sidings on the land of the plaintiffs, and belonging to them, made by them for convenience of transferring and carrying coal raised from their colliery to and by the defendants' line of railway.

Upon these sidings of the plaintiffs no engine of the defendants was accustomed to run throughout, and they were used solely, as far as the defendants were concerned, for placing therein returned empty waggons by the defendants and removing waggons therefrom when filled with coal. Waggons once left on these sidings by the defendants were entirely within the control of the plaintiffs.

The defendants were accustomed to bring empty returned waggons along the Parr Branch at any hour by day or night, and without notice to the plaintiffs to shunt such waggons on to the plaintiffs' sidings, where they were left under the plaintiffs' control.

Part of the sidings was crossed by a bridge used as a tramway, about eight feet in height from the level of the rails, on which rested part of the head gearing and supports necessary for the working of the plaintiffs' colliery.

An empty waggon, or one loaded in an ordinary way with coal, could pass safely and clearly under this bridge, and waggons were occasionally shunted under it by the defendants, but when they did so it was complained of by the plaintiffs, on the ground that waggons so left blocked up a public highway called Fleet Lane which crossed the siding between the railway and the bridge.

At the plaintiffs' colliery it was the ordinary custom to leave off work at 12.30 P.M. on Saturdays and to resume at 6 A.M. on Mondays. About 2.30 P.M. on Saturday, the 25th of January, 1873, the defendants brought three or four empty waggons of the plaintiffs, together with a disabled waggon of the plaintiffs loaded upon another waggon, and marked "home for repairs," along the Parr Branch, and shunted them on to plaintiffs' siding, and left them there.

The height of the waggon, with the disabled waggon loaded on it, was about eleven feet in all, too high to pass under the bridge before mentioned.

The disabled waggon loaded up on the other, and the two or three others, were known to a person left in charge of the plaintiffs' works during the absence of the workmen at 2.30 on Saturday, the 25th of January, to be on the siding, and were left standing there during Saturday afternoon and up till and during Sunday night, the 26th, and it was known to him that a number of waggons would arrive during that night.

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On the night of Sunday, about 12.30, the defendants brought up on their line a train of forty-eight empty waggons of the plaintiffs, and proceeded to shunt them on to plaintiffs' siding; but the night being very dark, the defendants' servants engaged in shunting did not notice that the loaded-up waggon was different from any other waggon in height.

The train of waggons was slowly backed along the siding, and coming against the waggons which had been left by the defendants on the previous Saturday, pushed them over Fleet Lane towards the bridge, so as to cause the loaded-up waggon to strike against the bridge, which checked the further progress of the train.

On touching the bridge the engine-driver felt an obstruction, and not having got all the waggons off the main line, which it was his duty to do, and believing the obstruction to be caused by a break, he, to use his own words, drew back the engine and gave another jamb up; by this he gave such a momentum to the engine that the loaded-up waggon knocked down and carried away the bridge and head gearing, which was the accident complained of by plaintiffs.

A guard in charge of the empty waggons was, whilst they were being shunted as above described, seated on one of the waggons about the middle of the train.

The plaintiffs had also a siding on the east side of the defendants' line, on which empty waggons were from time to time shunted by the defendants, and on which the waggons brought on the Sunday night might have been put.

At the trial the contention on behalf of the defendants was that there was no negligence on their part, and even if there were, there was contributory negligence on the plaintiffs' part, inasmuch as, knowing that waggons might arrive at any hour of the day or night, and that in fact they were expected to arrive on the night of the 26th, it was their duty to have removed the loaded-up waggon and to have the sidings clear; the plaintiffs, on the other hand, contended that there was no such duty on their part, and that there was no evidence of contributory negligence.

[The case on the appeal then set out a shorthand writer's note of the summing up of Brett, J., which is omitted, as not being required for the purposes of this report.]

In reply to questions left by the learned judge to the jury, they replied: "We think there was contributory negligence on the part of the plaintiffs." And the learned judge thereupon directed the verdict to be entered for the defendants. A rule for a new trial having been made absolute, as before stated, the defendants appealed.

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*Aspinall, Q.C. (McConnell with him), for the defendants.* The decision of the Court below, that there was no evidence of contributory negligence, is wrong. The accident was caused by the plaintiffs' omission to remove the loaded truck. If this truck had not been allowed to remain on the siding, nothing which the defendants' servants did would have caused any mischief. He cited *Davies v. Mann* (1); *Tuff v. Warman* (2); *Walton v. London and Brighton Railway Company*. (3)

*Herschell, Q.C. (Baylis with him), for the plaintiffs.* The decision of the Court below was right. The defendants, having left the loaded truck after working hours on the plaintiffs' siding, had no right to assume that this truck had been removed by the plaintiffs. There was no obligation on the part of the plaintiffs to remove it during non-working hours, and the defendants had no right to throw on them the burden of taking extraordinary measures. Even assuming that the plaintiffs ought to have removed the loaded-up truck, the defendants ought not to have forced it against the bridge, in the manner they did, without ascertaining the cause of the obstruction. The plaintiffs were not bound to anticipate that the defendants would use the siding as they did, without ascertaining that it was clear. The defendants have not shewn that they were in the habit of leaving disabled waggons on the siding, which they had a right to expect would be taken away. Secondly, there was a misdirection at the trial, and the law, as laid down in *Davies v. Mann* (1), was not sufficiently explained to the jury. He cited *Bridge v. Grand Junction Railway Company* (4); *Dimes v. Petley*. (5)

*Aspinall, Q.C., in reply.*

(1) 10 M. & W. 546.

(3) 1 Har. & Ruth. 424.

(2) 2 C. B. (N.S.) 740; 26 L. J.

(4) 3 M. & W. 244.

(C.P.) 263; in error, 5 C. B. (N.S.)  
573; 27 L. J. (C.P.) 322.

(5) 15 Q. B. 276; 19 L. J. (Q.B.)  
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BLACKBURN, J. In this case the rule in the Court below for a new trial was made absolute on two grounds, the principal one being that the Court thought that there was no evidence of contributory negligence, by which I understand any neglect of duty or conduct on the part of the plaintiffs sufficient to disentitle them to recover in this action; the second, that, assuming that there was any such evidence, the case was not properly left to the jury. The majority of the Court, I think, are of opinion that on neither ground was the Court below right.

I will first state the question, which is really the important one, whether there was evidence which, if properly left to the jury, would take from the plaintiffs the right to recover, assuming that the defendants were guilty of negligence. I believe that there is no dispute, and that for many years there has been no conflict of authority as to what really is the law upon the subject. I think that all the cases uniformly agree in this, that though the plaintiff, or the person who complains of negligence, may himself have been guilty of negligence, and may have put his property in some place where it is exposed to danger, though leaving it there was negligence on his part, yet that does not disentitle him to recover for the consequences of negligence on the part of other persons, which has injured him or his property. A man is bound, when he puts himself in a place where he knows other persons are coming, and are in the habit of coming, not only for his own safety, but for that of his neighbours, to take reasonable care of himself and of his property; but, whether he does this or not, it does not relieve anybody else who comes there from the duty of also taking reasonable care.

In the case of *Davies v. Mann* (1), where a fettered donkey was lying on a highroad, and a man came driving furiously past in a way which, if it had been an unfettered donkey or a man, would have made him liable to be run over, it was held, although no doubt the accident could not have happened if the donkey had not been there, though no doubt it was negligence on the part of the owner of the donkey to leave it fettered there without any assistance, yet this did not excuse the defendant for driving over it, and did not disentitle the owner of the donkey to recover damages.

(1) 10 M. & W. 546.

So in the similar case of a drunken man who might be lying on the highway, if anybody carelessly driving on the road drove over him, he would have to pay damages, because the drunken man did not lose his right of action by his negligence.

It comes, therefore, to this: was there evidence here which shewed that the plaintiffs were guilty of negligence, and that the negligence was directly a part of the proximate cause of the accident? I think there was. We must look at the statement of facts. In the first place, this high waggon, loaded with a broken waggon, is put on the siding on the Saturday afternoon. There it stood, and the plaintiffs had possession of it. They knew perfectly well that the course of business was that the railway servants came in the night and in the dark, and brought the waggons to this very same siding; and they also knew, for I think this appears to be pretty clear, that when other waggons were standing there they shoved them back, in order to bring others to take their places; and they must have known that a high waggon of this sort, if it were driven back so far as to go under the bridge, would be liable to beat against the bridge, and thus to cause mischief. This being the state of things, the first question seems to be, was it negligence on their part to keep that high waggon standing there from the Saturday night until the Monday morning? because that is what they did, the accident happening on the Sunday night, in the dark. I think it was negligence, and there was an absence of reasonable care on their part, knowing that the railway company's servants were likely to come there and send their waggons there.

Now I think it was carefully left to the jury, and they were properly told that the question was whether the plaintiffs had done what a reasonable man would have done, or omitted to do something that a reasonable man under the circumstances would do. If so, they were guilty of negligence.

The question was asked, would a reasonable man, under the circumstances, have left that high waggon there (because it was its height which made it dangerous), standing, as it did, for thirty-six hours without removing it? It is true that it was after working hours, and after the workmen had left the colliery, but would a prudent man have removed it from the siding? The question was clearly one for the jury, and the jury have rightly answered it by

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finding that there was negligence. But then it does not follow that the defendants might not be liable. The strongest evidence of their negligence is this, when they were pushing the waggons into the siding and felt a stoppage, which, as we know, was the high waggon coming against the bridge, they concluded that the bridge was high enough to pass under, took back the engine and then brought it with such an impetus, that the trucks were shoved forward against the bridge, and brought it down. This was certainly evidence for the jury of negligence on the part of the defendants, and if they thought that this negligence, notwithstanding the fact that the high waggon had been left there, was the proximate cause of the accident, the defendants would have been responsible. But that question was substantially left to the jury. It was pointed out in terms sufficient to bring the question before them, that there was no negligence on the part of the defendants in what they did, unless they knew the high waggon was there. "Do you think," says the judge, for it is put in so many words, "that when the defendants knew, or rather the defendants' servants who left it there on the Saturday night knew, that it was there, that it was negligence in the defendants' servants, and consequently in the company, not to leave warning to the other men that came up, to tell them, "There is a high waggon up there, look out for it." It is left to the jury whether that is negligence on the part of the railway company. Then it is left to them. "Was it negligence on the part of the other servants of the railway company to push up the waggons in this way without sending down a man to see where the obstruction was?" All this amounts to saying that the negligence on the part of the defendants depends upon this, whether or not they were aware there was this high waggon, or ought, as reasonable men, to have anticipated that possibly it was there. For if not, there is nothing on their part but what takes place in the ordinary course of business. If that is so I venture to say it is not a question about words, but there was a state of things which would disentitle the plaintiffs to recover, because I think it would appear that not merely the negligence of the plaintiffs in leaving this high waggon standing there was a *causa sine quâ non*, a cause without which the thing would not have happened, for it clearly would not have happened unless the

high waggon had been standing there, but also that if the mischief would not have happened but for that negligence on the part of the plaintiffs, and all that was imputed to the defendants was dependent upon this, whether or not they ought to have supposed that the high waggon was there, then, if the defendants had no reason to believe that it was there, they were guilty of no negligence at all, and consequently the plaintiffs' negligence in leaving it there was the proximate cause of the accident, and not merely the *causa sine quâ non*. The distinction between this and *Davies v. Mann* (1), and that class of cases, is that though the donkey, which was left there, was the *causa sine quâ non*, yet the defendant was guilty of negligence in driving furiously and in a way which would have been negligent even if there had been no donkey there, because he had every reason to expect that other people would come there, and even if an unfettered donkey had been there, although it might have got out of his way, yet it would have been liable to be run over, and therefore the defendant was guilty of negligence. Then the question comes to be, could the plaintiffs avoid the consequences of the defendants' negligence? This being so, I cannot agree with the Court below, that there was no evidence of such a state of things as to disentitle the plaintiffs to recover.

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Then comes the question whether the judge gave a sufficient direction to the jury. Now I must disclaim the idea that any learned judge is bound to follow a particular form of words; the direction should be such as to convey to the jury the real question. [The learned judge then referred to the direction of Brett, J., and expressed his opinion that it was sufficient.] The result is that the judgment of the Court below will be reversed.

MELLOR, J., concurred.

LUSH, J. I am of the same opinion. I would only add, as to the first ground, that the Court below came to the conclusion that there was no evidence of contributory negligence to be left to the jury, by assuming that it was out of the power of the plaintiffs to remove that waggon between the time when it was left there on the afternoon of the Saturday, and the Sunday night at the time of

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the accident ; but there is no evidence in the case to warrant any such assumption, and I am unable to see, as matter of law or as matter of experience, that it was impossible for the waggon to be removed. If it could, it ought to have been. This was a question for the jury, but my Brother Bramwell in his judgment takes it for granted, and it is the foundation of his judgment, that it was not practicable to remove the waggon between the Saturday afternoon and the Sunday. Then my Brother Bramwell also thinks, I observe, that the point which arose in *Davies v. Mann* (1) was not put to the jury. But I think that it was. In this particular case you could not approach the question of the defendants' negligence without involving in it the supposed negligence of the plaintiffs. Had the waggon not been there, the accident would not have happened. The supposed negligence is only in shoving on the train without ascertaining whether or not a high waggon was in the way ; whether they should have ascertained that it was there, or known it was there, or sent a man down to know what was the matter before they shoved on the other waggons, were all questions for the jury.

My Brother Grove, who is obliged to attend an official appointment, desires me to say that he concurs in this judgment.

BRETT, J. I can only say that I cannot see that what I did was wrong, though I have no doubt that what I did might have been much better done.

DENMAN, J. I cannot come to the same conclusion as the rest of the Court. I feel convinced that I must be mistaken, because I find that all my learned Brethren differ from me, still it is my duty to give the ground of my opinion. I think on both grounds the judgment of the Court below is right. With regard to the question of whether there is evidence of contributory negligence here which should disentitle the plaintiffs to a verdict, I do not found my view on the ground that there was not some evidence of what might be considered negligence on the part of the plaintiffs. I think that it was quite open to contend that the plaintiffs, through their servants, were guilty of negligence in leaving that

(1) 10 M. & W. 546.

waggon unattended to during so long a time as they did, but I do not think that every sort of negligence of which a plaintiff may be guilty is necessarily contributory negligence such as would deprive him of the right to recover. I think cases may be easily put in which no one would doubt that though there was negligence, it was so far removed from anything to do with the cause of the accident, that the plaintiff would not thereby be prevented from recovering; and I cannot help thinking, where it is perfectly plain that the accident happened owing to some definite and affirmative act on the part of the defendant constituting negligence, that then it will not do to say that the plaintiff was guilty of some act of negligence without which the accident would not have happened, because without it the thing to which the accident happened would not have been in that place. Therefore I think that in every case, before the judge leaves the question of contributory negligence to the jury, he ought to be satisfied that there is something which might or could be reasonably held by them to be, properly speaking, the cause of the accident. Now undoubtedly this truck would not have been injured, or have injured the bridge, if it had not been there where it was placed by the defendants, and left without any interference on the part of the plaintiffs during many hours. But it strikes me, upon the evidence, that it is as clearly made out as anything can be that the accident was not, in any common sense view of the matter, due to that, but that it was due to an affirmative act on the part of the defendants which we must take to have been found by the jury, because the question of contributory negligence does not arise until the negligence of the defendant is supposed to have been settled and found by the jury. The negligence, from which the accident happened, was charging the bridge with a quantity of trucks at the end of which was the truck in question, and when it was found that the trucks came to a standstill, not being content to stop and look to see what was the cause of the stoppage, but pushing violently with an engine the whole train with that unknown stoppage at the end, and so throwing down the bridge. It appears to me, therefore, that though there may have been some negligence on the part of the plaintiffs, it was not negligence which in any sense caused the accident, but that it was entirely the affirmative act of the defendants' servants, in

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charging the bridge as they did ; and therefore, although there is some evidence of negligence, there is nothing that ought to be considered in point of law as evidence of contributory negligence.

The Court below, though they did not put the case exactly in so many words as I put it, seem to have put it in substance the same way. They did no doubt rely upon the fact that during the intermediate time nothing could have been properly done. At all events, it is sufficient to say that there is no evidence, as it seems to me, of anything unlawful or wrongful on the part of the plaintiffs in leaving the waggon there between one day and the other. Then, secondly, the question arises whether the jury were misdirected. [The learned judge referred to the summing-up, and expressed his opinion that it did not sufficiently explain the law (as laid down in *Tuff v. Warman* (1)) to the jury.] I agree, therefore, with the judgment of the Court below.

ARCHIBALD, J. I agree in the opinion of the majority of the Court. The rule below was made absolute on the ground of misdirection. The misdirection, as I understand the case, appears to be that there was no evidence of contributory negligence on the part of the plaintiffs, and that the learned judge ought to have told the jury so ; but on the argument here, not only is that point taken, but it is also insisted that the learned judge failed to explain sufficiently to the jury the effect of contributory negligence on the part of the plaintiffs. Now, I quite agree with the authorities cited, that it is not every species of contributory negligence on the part of the plaintiff (at least it is not under all circumstances) which will excuse the negligence of the defendant ; and although there may be negligence on the part of the plaintiffs which does in fact contribute to the accident or the mischief, yet, if the defendant might by reasonable care and caution have avoided it, he will nevertheless be liable. I think the question has been in substance sufficiently left to the jury and explained to them by the learned judge.

I also agree that there was in this case evidence to be submitted to the jury of negligence on the part of the plaintiffs. Adopting

(1) 2 C. B. (N.S.) 740 ; 26 L. J. (C.P.) 263 ; in error 5 C. B. (N.S.) 573 ; 27 L. J. (C.P.) 322.

that view, there comes the question, what was the conduct of the defendants in the case? If they had rashly, without any care at all, driven this train of empty carriages into the siding, and recklessly and carelessly driven the high carriage against the bridge, I can quite understand circumstances under which they might be answerable, although there was negligence on the part of the plaintiffs in leaving the carriage there. But the question would be, what was the conduct of the defendants? Did they take such measures and precautions as they ought to have taken, assuming the existence of negligence on the part of the plaintiffs? That is the exact question which the learned judge left to the jury. He called their attention to the question of what ought to have been done in the exercise of ordinary care, and what should have been the conduct of the defendants on the occasion. [The learned judge proceeded to comment upon the terms of the summing-up.] I think, therefore, that there was no misdirection, and that there was evidence for the jury of contributory negligence, and that upon both grounds the judgment of the Court below ought to be reversed.

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*Judgment reversed.*

Attorneys for plaintiffs: *Sharpe, Parker, & Co., for Peace, Wigan.*

Attorney for defendants: *R. F. Roberts.*

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Feb. 9.

[IN THE EXCHEQUER CHAMBER.]

THORN v. THE MAYOR AND COMMONALTY OF THE CITY OF LONDON.

*Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in Mode specified—Implied Covenants.*

The defendants being about to construct a bridge across a tidal river, employed an engineer for the execution of the works, and specifications and plans and drawings of such works were prepared by him. The defendants then issued an advertisement inviting tenders for the execution of the works comprised in the specification, plans, &c. By the specifications the foundations of the piers were to be put in by means of caissons, as shewn in a drawing; the form and dimensions of the ironwork and size of rivets to be as shewn on the drawing, or to be thereafter supplied by the engineer, &c. By the deed, after reciting the specifications and tenders, the plaintiff covenanted that he would complete the work, according to the terms of the specifications, within three years. Power was given to the defendants' engineer to alter the mode of executing the work, and it was provided that if additional expense was incurred by such alteration, the plaintiff was to receive compensation, to be fixed by the engineer.

The plaintiff commenced the work, and after he had incurred great expense, it was found that the work could not be executed by means of the caissons in the manner specified, and by the directions of the engineer a new mode of putting in the foundations was carried out. The plaintiff having brought an action to recover the value of the work which was thereby thrown away :—

*Held*, by the Exchequer Chamber (affirming the decision of the Court below), that no warranty by the defendants that the work could be executed in the manner described in the plans and specifications, was to be implied.

Per Blackburn and Mellor, JJ., that the mode of laying the foundation by means of caissons was not part of the contract, but only a mode of carrying it out, which the engineer had power to alter.

Per Brett, J., that this mode of laying the foundations was a substantive part of the contract, and that the plaintiff could only be required to pursue a different mode under a new contract.

ERROR upon a judgment of the Court of Exchequer in favour of the defendants (1), where the facts are fully stated.

Feb. 8. *Benjamin, Q.C. (Littler, Q.C., and J. W. Batten, with him)*, for the plaintiff, repeated the arguments urged in the Court below.

*Giffard, Q.C. (Thesiger, Q.C., and Mackenzie, with him)*, for the defendants.

Feb. 9. BLACKBURN, J. In this case, which was argued yesterday, we are all of opinion that the judgment below ought to be affirmed, though I must not say that we are all agreed as to the reasons for affirming it. I have reasons of my own which, I believe, are those of the majority of the Court, but which may be qualified by what my learned Brothers may say when they have heard my judgment.

The plaintiff, who is a contractor, entered into an agreement by a formal indenture, in which there are various covenants. It begins by reciting, as the fact was, that there had been previously issued on behalf of the corporation specifications, in which they described the kind of work for which they were inviting tenders, and the indenture contains a covenant on the part of the plaintiff that he would complete the work; not making the specifications part of the contract, but that he would complete the work in the manner described in the specifications, and do the work according to the terms of the specifications; and there is in the indenture a condition that if the mode of doing the work is altered, which it may be, and power is given to the engineer to alter it, the contractor shall do it in that altered mode, and that if in consequence of the alteration he may have incurred any additional expense in doing the work (of which the engineer is made sole judge), he shall receive compensation, of the amount of which the engineer is also to be sole judge. There is also a further term in the covenant that he is to execute the work in three years, and that if he delays the completion of the work beyond that time, he is to forfeit 1000*l.* a month for every month's delay. But there is a further provision, that if the engineer, who is again made sole judge, thinks that the delay has been in consequence of some matter, which is, *inter alia*, by no fault whatever of the contractor, in that case also the engineer, as sole judge, may give further time, and doubtless would do so. Such is the contract, and there is no express covenant whatever that the specification, and the mode mentioned in the specification, shall be one that is practicable. Now the question that arises comes to be this: when we look at the specification we find that the work to be done was to build a bridge—Blackfriars Bridge—across the Thames, a tidal river, as we all know, and it is provided for in the specification,

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and pointed out that the foundations are to be laid in a particular way, which I need not further allude to except to say it was quite practicable and successful, and they were ultimately laid. The foundations to the piers were to be laid to the depth of some feet—the precise number does not matter—below the level of low water, and of course, the tide rising and falling, they would be twenty feet or more below the top at high water. Now, in that state of things, in order to build the piers, it would be, if not indispensable, at all events convenient, to keep the water out around them, so that the workmen might work, in carrying out the work of building the bridge, in a place like dry land, and the well-known mode of doing this would be to have a coffer-dam. This coffer-dam would probably, though it is not expressly stated in the case, be an expensive work, and would certainly occupy part of the room in the river, and as the bridge was to be made under the control of the conservators of the Thames, it was an object to avoid interfering with the water-way more than was absolutely necessary. The specification discloses, and the engineer had doubtless arranged, with a view to what was proposed, that the piers were to be built in this way (I may say briefly I do not pretend to accuracy in it): caissons seven feet in height were to be sunk, between which caissons, when put down, there were interstices, which were made water-tight by means of piles, which would make water-tight compartments seven feet high. On the top of that there was to be second, third, and fourth sets of caissons, which would make the water-tight compartment twenty-eight feet high, and which would bring it above the top of the water at high water; and it seems that the proper thickness and the nature of the iron, and everything in those caissons, is mentioned in the specification, so as to shew what kind of caissons they were which were intended to be put down, and it appears, and I presume (though not being an engineer I do not say it of my own knowledge) that a person looking at it would understand it was contemplated, when this water-tight compartment was made of the height of twenty-eight feet above the foundation below, that the water might be pumped out once for all, and that then there would be a water-tight compartment twenty-eight feet high, free from water, requiring no further pumping than such as might be required in consequence of any small

leakage or rain that might fall, not having the tidal water of the Thames coming into it, and then when once that was done the workmen were to build within that dry water-tight compartment a pier, exactly as if it were being built on dry land. It would be in lieu of a coffer-dam, and perhaps it might be called a coffer-dam, only not made in the way a coffer-dam usually is, and I apprehend also—though this, again, is not stated in the case before us—that this mode of doing the work by means of caissons was not the usual and ordinary way, but was the way devised on this particular occasion, and which it was expected by the engineer would sufficiently answer the purpose which was in the contemplation of the parties. Now when this came to be put into operation, it turned out, either from having under-estimated the force of the tide, or, what is more likely, from having over-estimated the strength of the piles and materials, but for some reason or other which is not explained, when this was done, and it came to be high water, the water broke in, and the workmen could not build in the way which was anticipated. This was clearly no fault of the contractor; and the engineer, after having tried to remedy it in various ways, finally removed the two top caissons, so as to make the water-tight compartment only fourteen instead of twenty-eight feet high, and the consequence was that some of the work done by the contractor was thrown away, for although until the tide had risen fourteen feet there was less than a pressure of fourteen feet of water on the side of the caissons, and it was dry enough, as soon as the tide rose above fourteen feet it filled up the interior of the caissons, and, as is quite obvious, the workmen could not work, but had to wait until the tide fell again, and then, the water being pumped out, they could proceed with the work again. The case states, and it is again obvious, I think, from the statement made, that the consequence of this was that the contractor was put to additional work, labour, and expense—how much is not stated—and it is not material whether 100*l.* or 100,000*l.* would be the compensation, for that is immaterial with regard to this point of law. There was no doubt expense; further, there was delay—it is not stated how much—and, as I said before, it is immaterial for our consideration whether this was to be measured by tens or by units.

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Now the question arises whether, under the contract as entered into, there was anything which the corporation had made a part expressly or impliedly of the contract which makes them liable to compensate the contractor for this additional delay. It seems to me—I am now speaking for myself, for I believe at least one member of the Court does not agree in what I am going to say—that the caissons round the pier were but a mode of carrying out the work; the thing to be done was to build the piers. The mode pointed out in the specification, and the mode in which the contractor was to proceed in the first instance to do the work, was by means of these caissons, but when it was done they were to be removed. I think they were like the scaffolding of a house—not part of what was to be done, but a mode of carrying it out; and taking it in that way, and supposing it to be so, it would follow that the contractor was bound to do the work in the altered mode which the engineer pointed out, having his recourse for the extra expense to the provision in the contract by which the engineer was to allow compensation for the extra expense, the engineer being sole judge of what it should be. As to whether the contractor was entitled to say, “I will not go on with this mode of carrying out the work,” I think he was not so entitled; but supposing him to be so entitled, he did not rely on any such right; he treated the matter as if the engineer had a right to order him to do the work in this altered mode, and he did do it in this altered mode, and as far as regards extra expense the engineer, Mr. Cubitt, has given him compensation. We have no right, had we the materials before us, to review the engineer’s decision on this subject. We have not the materials; and he awarded compensation which I have no doubt he thought fair, just, and liberal, and which I hope was so. So far as that is concerned the contractor got paid. But the delay is a separate thing. If there is any contract, express or implied, by which the corporation warranted to the plaintiff that the mode pointed out in the specification, and on which he made his tender, could be carried out—if there was any such contract, express or implied, I say it has been broken, and the damage arising in consequence of delay from this would have to be assessed, and the plaintiff would be entitled to recover.

Now when you look at the contract, it does not embody the conditions on which Mr. Benjamin in a great measure rested his argument (they are not made part of the contract), all that is done is to refer to the specification for the mode in which the work is to be carried out, but certainly in the contract itself there is no such express warranty, and the question in the case is, are we to imply such a warranty? I think if the case were, which I do not think it is, that the building of the bridge—the thing to be done, in the mode mentioned in the specification—was in fact impracticable, I do not think it would make any difference, but at the same time I should want to consider the matter before I said whether it would make a difference. It seems to me that unless you can find an implied contract that the mode of building it described in the specification is reasonably practicable, there is no case for the plaintiff. Now, taking that view of it, let us see whether there is any ground for implying such a contract. It is true that the contractor, looking at this and knowing it—and we must assume that the contractor, or those who are acting for him, have competent knowledge of the mode in which bridges are generally built—if he saw a new thing substituted for a coffer-dam which had not been tried before, and had said, “I think this will probably work well, but it is a new plan which has never been tried; a new plan will sometimes go wrong,” and had gone accordingly to the corporation, or those who represent them, and said, “I think this will probably work well, and I have made my estimate accordingly; but it may not work well, and therefore I request you to give me an indemnity, in case the mode should prove to be impracticable, and so cause delay and expense;” if he had done that, and they had answered, “We are so convinced that this is all right, that we will warrant this new plan will work practically;” if they had said that, and had embodied it in the contract in express terms, then the plaintiff would be entitled to recover; but there is certainly no such express warranty. If, on the other hand, the corporation had said in express terms, “We will warrant nothing, we think this mode will do. If it proves ineffectual, and you are put to damage and expense, you will have, by the agreement which is proposed to be drawn, the compensation which the engineer thinks fit to allow you, and anything

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more we will not warrant at all," and had put into the contract an express negative of all warranty, it seems quite clear that the plaintiff would have had no shadow of a case at all. The question therefore comes to be,—there being no express statement one way or other in the contract, which states on the face of it that the mode of doing the work had been previously pointed out by the specification prepared by the corporation,—are we to say that there was any implied warranty to the effect that that mode of doing it was practically sufficient? If so, the plaintiff would be entitled to recover.

Now, certainly, when you have a formal document under seal without a warranty in express terms, we should not be likely to imply a warranty unless there is the clearest reason for it. Mr. Benjamin admits that he is unable to find any analogous cases in which a warranty has been implied under circumstances similar to these; and it seems to me that the burden is on the plaintiff to shew that a warranty is fairly to be implied. I may say that, far from seeing any reasons, legally or morally just, from which we should imply it, it seems to me that the convenience and the right of things are all on the other side. As was well expressed by Mr. Baron Amphlett, on the occasion of the consideration of this case by the Court below, the contractor might, if he doubted whether the scheme was practicable, have asked the corporation for an express stipulation, or he might have declined to enter into the contract. He has done neither. He has chosen rather to act on Mr. Cubitt's reputation, or his own notions as to its being practicable, and has asked for nothing. It seems to me that if we were to introduce a warranty, we should be putting something into the contract which not only the parties did not put in it, but which they did not intend to put in it, and which, if it had been proposed to them, would probably have been refused; or, if they had agreed to any at all, it would have been a warranty considerably modifying any provisions as to how the work was to be carried out. Taking that view of it, I agree with what is the substance of the judgment below, that the plaintiff cannot recover on an implied warranty, there being no express warranty in the contract, and consequently the judgment of the Court below must be affirmed.

MELLOR, J. I am of the same opinion, and concur generally in the reasons given by my Brother Blackburn. I cannot think we are at liberty to infer from the circumstances of the case an implied warranty that the plans and specifications prepared by Mr. Cubitt on the part of the corporation were such as really could be executed. The contractors were at liberty, if they pleased, to employ their own engineer to see whether or not these plans were such as could be executed, and executed within the time limited. Both of the parties were, I think, on equal terms. I think it would be a dangerous thing if, under circumstances like these, where there are provisions with regard to delay on the one side, and there is no such provision on the other, we were to imply any such stipulation. Now the claim here is not for the extra expense to which the parties were put in executing the works; that has been settled. The claim is that they were so delayed in the execution of the works by reason of the failure of the plan, that their capital, machinery, &c., were kept idle. I can only say that if the contractor is to be entitled to have this made good by the corporation, he must give us stronger reasons than he has for implying a warranty.

LUSH, J. I also concur in the opinion of my learned Brothers, that the judgment of the Court below ought to be affirmed; and I do so on the short ground that there is nothing in the contract which shews an intention on the part of the corporation to warrant the efficiency of the mode described of keeping out the water, and so enabling the contractors to go on with the work of building up the piers of the bridge. It is admitted that there is no express contract of the kind, and there is nothing whatever, in my opinion, to justify the Court in implying any such contract; therefore, to impose such an obligation on the corporation would be to introduce a stipulation into the contract which the parties, either from design or inadvertence, it does not matter which, omitted; and we should, by so doing, introduce a new term into the contract, which the Court certainly is not competent to do.

BRETT, J. I have come to the conclusion that the plaintiff cannot recover in this case, and that the judgment of the Court

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below ought to be affirmed ; but I differ from some of the steps by which the same conclusion has been arrived at by my learned Brothers. Having no hope of altering their determination, I feel bound to state the grounds on which I think the judgment ought to be affirmed. I entirely agree that when a specification and plan are offered for tender by advertisement, they are at that time merely an offer, and there is no contract until the tender has been sent in and has been accepted ; and if a contract or deed is then drawn up in writing, the specification and plan become no longer part of the contract ; the only contract which can be considered by the Court is the written contract, that is to say, in this case, the indenture. Then the question is, whether we can imply in this indenture a particular covenant. I think we have a right so far to consider the specification, plan, and tenders, as to take notice that the contract is made by means of such a process ; and the question must be whether the proposed covenant can be implied in the indenture from the fact that the indenture was arrived at by means of the specification, plan, and tender. Now, this being so, I, although with great hesitation and deference, cannot come to the conclusion that in this case the substance or the subject-matter of the contract was merely the building of a bridge, and that the making of the caissons was a mere mode of dealing with the subject-matter of the contract, as if it were the scaffolding which is used for the purpose of building a house. If that were so I should not expect to find details of the mode in which the caisson was to be constructed. I do not recollect a contract, where the subject-matter being the building of a house, and where the scaffolding was to be erected for the purpose of building it, in which the exact method of making the scaffolding was in the specification ; though it might be generally mentioned, still, if a mere mode of building the house, and the house were the subject-matter of the contract, I should say that the tenderor would leave a very considerable latitude as to the mode in which the contractor should deal with the scaffolding ; but here the very manner and method of making a caisson is one of the most particular parts of the contract. The caisson is an iron caisson, and as a matter of business and business knowledge, I should say that an iron caisson, built according to these specifications, was a wholly different thing

from that which is called a coffer-dam, which, as I understand, is a thing made of timbers, and it is so wholly different, that it would be practically made and constructed by people of wholly different trades. Therefore, considering the mode in which the caisson is described in the specification, considering the practical difference between an iron caisson of this kind and a coffer-dam, although in in some senses they are analogous and alike, and certainly are made for the purpose of performing the same ultimate function, I cannot think that the making of the caisson was a mere mode of building the bridge, for I think it was a substantial part of the contract, and one of the subject-matters of the contract. My view of the contract, therefore, is that it is to do successive things in a particular order, first, the making of the caisson, and after that the foundations of the bridge were to be built, and then the bridge was to be made and based on those foundations. Now there is nothing in the contract itself which would bind the plaintiff to make any part of the bridge before the caisson was completed, but practically I should say that the bridge must have been prepared. Considering the time in which the whole structure was to be finished, it would be absolutely necessary, I should think, on the plaintiff to have the bridge prepared and ready to be put up before the caissons were finished; at all events, it was right and reasonable that he should have them ready.

Now then comes the contract. I think the miscalculation was, in the first place, the miscalculation of the corporation. The engineer, Mr. Cubitt, was the engineer of the corporation, and I think the miscalculation was their miscalculation, and, therefore, the case must be considered precisely as if the contract had been made by Mr. Cubitt on his own behalf, and he had made the miscalculation. I think, further, that it was such a miscalculation as certainly prevented the plaintiff from earning the advantages which he was intended to have under and according to the contract. Certainly the miscalculation goes to that extent. I doubt very much whether it is not such a miscalculation as prevented the whole work being carried out at all under or according to the contract. I cannot, as at present advised, subscribe entirely to the view expressed by my Brother Blackburn, which is, that under the clause in the contract which enabled the engineer to make

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alterations, when those caissons failed in the mode in which they did fail, the engineer was able to substitute another method which would carry out the same result, and that the plaintiff was obliged to carry that out, for if that be the true view of the matter, it seems to me that the engineer might have directed that coffer-dams should be made, which, as I have already ventured to state, seems to me a radically different thing, and which requires a knowledge of a different kind of trade, and I cannot think that the plaintiff would have been bound, upon the order of the engineer, to abandon the making of the caissons in iron, and to adopt, upon the engineer's order, the making of the coffer-dams in timber. I am, therefore, inclined to think that the miscalculation of the corporation not only prevented the plaintiff from earning that which he was entitled to earn under the contract, but prevented the carrying out of the contract according to its terms, and the only way, therefore, if the plaintiff went on with the work, in which he could proceed must have been by a new contract, either expressed or implied. I must, therefore, deal with the case as if, upon discovery of the impracticability of the caissons, the plaintiff was not bound to proceed with the contract at all; and, therefore, the case comes to be the same to my mind, except for the purpose of the particular kind of damages claimed, as if the only subject-matter of the contract had been the caissons, and as if the miscalculation of the corporation had prevented the plaintiff from carrying out the contract or earning profit under it.

Now, upon this state of things, Mr. Benjamin argued that, by reason of the wording of this contract, there was an implied covenant as to the practicability of these caissons, relying upon the principle expressed in the proverbial phrase, "*Expressio unius est exclusio alterius.*" Now, inasmuch as the express negatives of warranty on which he relied (1) are negatives of perfectly independent covenants, I cannot think the negative of a warranty in these cases is such as enables us to apply the affirmative warranty which he desires to introduce into this contract. It seems, therefore, to me that the only way in which a contract could be implied is to say that in all works of this kind which are entered into by means of specifications and plans advertised, and upon which

(1) See clauses 36 and 54, Law Rep. 9 Ex. at p. 165.

tenders are requested, there is an implied warranty on the part of those who issue the specification and tender that that which they desire to have done is a practicable thing; and nothing, it seems to me, can be more important than such a consideration. It is a vital consideration in a business of the largest kind. I cannot think that such a covenant can be implied under such circumstances. I have once before endeavoured to express what I deemed to be the only principle of law on which Courts can imply a contract between parties, and I endeavoured to enunciate that in the case of *Daniels v. Harris*. (1) What seems to me to be the principle is this. Whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must either have been latent in, or palpably present to, the minds of both parties when the contract was made—and unless you can say that the covenant which you desire to imply must have been so present to the minds of both, that if they had been called upon to express it anybody of ordinary intelligence or knowledge of business must have concluded that both would have expressed it in the desired form—I think the Court has no right to imply such a contract. Therefore the question comes to be, whether we can say of this covenant that, if both parties had been called upon to express their meaning according to the view of every person of ordinary intelligence and knowledge of business, they would have come to the conclusion that such a covenant must exist. Upon this point I think the judgment of Baron Amphlett in the Court below is most valuable. The question proposed is whether, in a specification, the person who is called upon to tender has a right to assume that the work is a practicable work, or whether he is bound himself to inquire.

Now it may be strongly argued that in one sense he is justified in relying on the practicability of the suggestion of the author. I cannot say that every person of ordinary intelligence and knowledge must come to the conclusion that the specification and plans are merely suggestions for an offer. But he who has to tender may offer or not at his pleasure. He certainly has to consider whether the proposition will be a profitable one to him. I think he must also go on, or it may be said he is called upon to go

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(1) Law Rep. 10 C. P. 1, at p. 8.

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on, and inquire whether that which is proposed to him is practicable. If the proposition is that the thing shall be done in a particular time, it does not seem to me unreasonable to say that he must consider and calculate for himself whether the proposed work can be done within the time; and it is but a step further to say that he must consider also for himself and calculate whether the work can be done at all, so as to enable him to earn the price he is to be paid. I think it may be said that both parties must make their own calculations; that if the contractor finds that the employer is proposing to him something which cannot be done, he ought not to offer to do the thing which in his mind cannot be done; and if he does not inquire into the matter or runs the risk, he must take the consequences, or if he thinks it doubtful he ought to correct the agreement by an express covenant. In the rule I have endeavoured to enunciate, though I think the impossibility of carrying out the covenant was caused by the miscalculation of the defendants' proposition, still I think that the plaintiff, having accepted the contract and entered into it, if he required the stipulation on which he now relies, he ought to have had it expressed, and we are not at liberty to put it into the contract. It is on these grounds that I concur in the decision that the judgment of the Court below should be affirmed.

GROVE, J. I am of opinion that the judgment of the Court of Exchequer ought to be affirmed, and I give no opinion upon the question as to whether the caissons in a contract for building a bridge may be likened to a scaffolding as being the mode of performing the work, or whether they are themselves part of the work contracted for. It does not appear to me to be necessary to decide that point in this case; but in my opinion, there was no warranty expressed or implied in the contract or the specification that the work done according to the specification should be sufficient and practicable. There is certainly nothing expressed on the face of the deed, and what would be the warranty if the Court were to imply a warranty from comparing all the various parts of these deeds? Very considerable variations are allowed by the deed, subject to the approval or under the direction of the engineer. To what amount of variation would the warranty extend, or how

far could certain variations be excluded from it, or, in other words, what departure ought to be permitted from the express terms of the specification? Without going minutely over the specification, there are things obviously of a substantial nature in which variations from the exact terms of the specification may be imported, and, therefore, if there be an implied warranty, it ought, in order fairly to guard the defendants in this case, to be such a warranty as would be capable of defining where it was to attach, and to what amount of variation it did not attach. I see nothing which would enable the Court by comparing the terms of the deed to imply any warranty sufficient to enable each party to know to what extent it went, or how far the plaintiff was protected on the one hand by it, or the defendants, on the other hand, pledged; so that it might be considered a reasonable and fair warranty between the parties. I think, also, there is enough in this contract, certain considerable variations being permitted, to call upon the plaintiff to say if he wished to be guarded against going beyond the specification, "I will not undertake this contract with a degree of variation of which I cannot very well see the amount, without having on the part of the defendants a proviso warranting me not merely as to the expense incurred (which is left in the specification entirely to the judgment of the engineer), but against what I may lose by the possible extension of time, as I am bound by the contract to three years." I see nothing which constitutes, on the part of the defendants, an implied undertaking that, if by any mistake in the specification or any variations beyond those given in the deed, the burden of the contract is increased beyond what was contemplated, the proviso as to three years is to be extended, the defendants paying any expense which may accrue from the extension. I do not see any warranty which by implication the Court could attach to this deed which would fairly be binding and operative between the parties, doing no injustice to either.

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OF LONDON.*Judgment affirmed.*Attorney for plaintiff: *J. B. Batten.*Attorney for defendants: *F. Brand.*



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Feb. 12.

*Statute of Frauds*—29 Car. 2, c. 3, s. 17—*Sale of Goods*—*Memorandum signed by Agent*—*Evidence of Agency*.

In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller when he took the order for the goods wrote out in the presence of the defendant upon printed forms two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it:—

*Held* (distinguishing *Durrell v. Evans* (1 H. & C. 174; 31 L. J. (Ex.) 337)), that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant, so as to bind him within s. 17 of the Statute of Frauds.

DECLARATION,—first count, for goods sold and delivered and money due on accounts stated; second count, for not accepting goods sold by the plaintiff to the defendant.

Pleas:—First, never indebted; second, denial of agreement. Joinder of issue.

At the trial before Bramwell, B., at the Middlesex Sittings after Michaelmas Term, 1874, it appeared that the plaintiff was a merchant, carrying on business at Paris and Knightrider Street, City, under the name of Brown & Co. In July, 1874, the plaintiff's traveller, Dehorter, called on the defendant, and obtained from him an order for the supply of French clocks. Dehorter wrote the order in duplicate, upon printed headings, by means of the manifold writing process, handing the duplicate to the defendant, and keeping the original, which was on three sheets of paper. The following is the copy of the order:—

*“ Ordered from Brown & Co.,*

*“ 68, Rue de Bondy, Paris,*

*“ And 30, Knightrider Street.*

*“ Date.* 14th July, 1874.

*“ Name.* Bernard Boese.

*“ Address.* Kidderminster.

*“ Terms,*  $2\frac{1}{2}\%$  discount for cash in 14 days from date of invoice, or net 3 mo. bill. Cases free. Goods carriage free to London.

[Here followed a specification of the articles and their prices.]

The words in italics were printed.

A dispute as to whether the defendant should be responsible for breakage of the goods during the transit having arisen, the defendant refused to complete his contract. It was now objected on his behalf that there was no sufficient note or memorandum in writing to satisfy the 17th section of the Statute of Frauds. The learned Baron nonsuited the plaintiff, giving him leave to move to enter the verdict for 29*l.* 9*s.*

A rule having been obtained to enter a verdict for the plaintiff, on the ground that there was evidence for the jury, and that they ought to have found that the contract had been duly signed on behalf of the defendant, so as to satisfy the Statute of Frauds,

*B. T. Williams* shewed cause. There is nothing in this case to shew that the traveller Dehorter acted as the agent of both parties in writing down the terms of the order. The defendant's name was merely written by the traveller upon a paper with a printed heading, just as it is done in the case of an ordinary invoice. The defendant did nothing to recognise the name written on the paper as his signature. He merely received the paper, just as though it were a tradesman's bill.

*Finlay*, in support of the rule. There was evidence that the traveller signed the memorandum as the defendant's agent. It is now well settled that it does not matter whether the signature of the party to be charged is in the beginning or middle of the instrument: *Schneider v. Norris* (1); *Johnson v. Dodgson*. (2) It is quite enough if the defendant's name is by his authority placed in some part of the contract. Here his name was written on the memorandum under his eye, and with his permission. There is no reason why the traveller should not prepare the contract as agent for both parties. It has been held that a note made by an auctioneer's clerk of the purchaser's name in a book is sufficient to bind him, in an action by the auctioneer: *Bird v. Boulter*. (3) But the case is not really distinguishable from the recent decision in *Durrell v. Evans*. (4) There the plaintiff's factor wrote down in the defendant's presence, on a printed form, the particulars of a quantity

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(1) 2 M. &amp; S. 286.

(3) 4 B. &amp; Ad. 443.

(2) 2 M. &amp; W. 653.

(4) 1 H. &amp; C. 174; 31 L. J. (Ex.) 337.

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of hops which the defendant had agreed to purchase, putting the defendant's name at the top. The defendant looked at the paper, and requested that the date might be added, and the factor altered it. It was held by the Exchequer Chamber that there was evidence that the defendant's name was put on the paper by his authority. So here, it is submitted that the fact that the defendant took and kept the paper, is abundant evidence of his consent that his name should be inserted in it.

BRAMWELL, B. I think this rule should be discharged. It has been argued that the case cannot be distinguished from *Durrell v. Evans* (1), but I think it may be said on the other side that it cannot be taken out of the express words of the Statute of Frauds. We are, no doubt, bound by the decision of the Exchequer Chamber in *Durrell v. Evans* (1), but this case is distinguishable from it, and when I remember that my Brother Crompton took part in that decision, I should wish to speak of it with the utmost respect. It was held in that case that the factor signed the paper on behalf of the buyer, and that this paper was intended to be a memorandum of the contract. I said in the Court below, not that the memorandum was an invoice, but that I could not see how the factor was authorized to sign on behalf of the buyer, but the Exchequer Chamber thought that there was evidence that the defendant meant the paper to be a memorandum of the contract. What they had to consider was, whether the paper before them had the defendant's name written upon it by an agent on his behalf. And they thought that there was evidence that the factor was the agent of the buyer, because the buyer took a share in the preparation of the contract, and said, in effect, to the factor, "Write it down in such a way." If that decision is wrong, it is wrong in deciding that what the factor was asked to do made him the agent of the buyer, whereas it might be said that the buyer was only suggesting a correction to him, and treating him as the agent of the seller. Upon this subject I will say no more.

Now here, after the order had been given by the defendant, Dehorter makes two copies of the order, delivering one to the

(1) 1 H. & C. 174; 31 L. J. (Ex.) 337.

defendant and keeping the other himself. To my mind the question comes to this: did Dehorter act as the agent for both the plaintiff and the defendant? Now if anybody, not a lawyer, were asked whether Dehorter acted as agent for any one but his master, he would say, Certainly not; it is unreasonable to suppose such a thing. Now although we are told that a lawyer's view of what is reasonable is different from that of other people—still I think that the common understanding is a good test of the real meaning of the transaction. Now, is there any reason why we should disregard the understanding of reasonable persons for the sake of avoiding the operation of the statute? I can see none. I cannot see how this traveller is the authorized agent of the defendant. After he took the memorandum away, the defendant would be at liberty to say, "I am not going to be bound by it." If he was the defendant's agent, when did the agency commence? Was he agent at the time he wrote? This will scarcely be suggested. Did he become agent afterwards by ratification? If so, you would come to this difficulty, that when the agent wrote the paper he did not profess to act for the defendant. Try it another way. Suppose the thing was done in a hurry, and the defendant had said, "The contract to which you have put my name is inaccurately drawn up, and I will maintain an action against you for your blunder." Would not the agent have been surprised at this? If it be said that the same argument would shew that *Durrell v. Evans* (1) was wrongly decided, I say that I do not know that this would be the case, for there they held that the defendant had made himself a party to the terms of the contract by requesting that the paper should be altered. As for the argument that the defendant is bound because the paper was written in his presence, I can only say, suppose he had been blind, or that he could not read, or that the paper had been copied out a week afterwards and then sent to him, could any agency have been inferred in such circumstances? These difficulties appear to me insurmountable. I think the rule ought to be discharged.

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PIGOTT, B. I am of the same opinion. *Durrell v. Evans* (1)

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differs in its facts from the present case in a material particular. Here there was nothing done by the defendant to shew that he constituted the traveller his agent. All that he did was to give an order, and when it was written out to take possession of it. Now is there in these facts evidence that he constituted the traveller his agent, to make a memorandum of the terms of the bargain? It is plain that there was no express authority, can any authority be implied from the facts? If it can, at what moment did the traveller become agent—after he had written the memorandum? or after the defendant had received the copy and kept it? Now, it seems to me, that none of the facts are different from what they would have been if the traveller had been only the plaintiff's agent. There is no circumstance inconsistent with his being merely the agent of the vendor. The buyer did nothing which is not done every day where the traveller acts for the vendor only. And it may be asked is the question to be raised in each of these cases, did the defendant see the traveller write out the order? did he approve of it? and are these questions to be left to the jury—we well know with what result. I think that these questions ought to be answered in the negative, and that this rule should be discharged.

POLLOCK, B. I also agree that this rule should be discharged. I think that it is extremely important in all those cases in which it is attempted to prove an implied agency, or that there is evidence from which an agency may be inferred, to take into account the character of the parties and their usual course of dealing. The Act requires that the note of the bargain should be signed by an agent of the party to be charged. At first sight it would seem odd that where two contracting parties meet together, that one who is in a position somewhat adverse to the other should be his representative and agent. But no doubt such a thing may happen, as in the instance which has very properly been cited of the auctioneer's clerk signing as agent of both parties. In Lord St. Leonards' work on Vendors and Purchasers, 14th ed. p. 147, he explains the principle upon which the auctioneer can bind both vendor and purchaser by his signature, citing *Earl*

of *Glengal v. Barnard* (1), and *Emmerson v. Heelis* (2), and stating that the implied agency of an auctioneer is not extended to other cases. Therefore the present case is not within this exceptional rule. The case to which it has the nearest analogy is that of *Durrell v. Evans* (3), and it is remarkable that when that case came before the Court of Exchequer, Lord Penzance seems to have drawn the conclusion that what was done was nothing more than what occurs in making out and giving an invoice. I am bound to say that I agree with his reasoning, and I will apply it to the present case. I think *Durrell v. Evans* (3) can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes the factor to alter the instrument, was an adoption of his act in preparing it, or a recognition ab initio of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction, and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties in drawing up a note of the contract. But here there is an entire absence of any act of recognition by the defendant of the traveller as his agent. The rule must be discharged.

*Rule discharged.*

Attorney for plaintiff: *W. R. Buchanan.*

Attorney for defendant: *F. Berkeley Calcott.*

(1) 1 Keen, 769.

(2) 2 Taunt. 38.

(3) 1 H. & C. 174; 31 L. J. (Ex.) 337.

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## LOCKHART v. FALK.

*Ship—Shipping—Charterparty—Demurrage—Clause exempting from Liability.*

By a charterparty made with the defendant, plaintiff's ship was to proceed to W., and there load a cargo "in the customary manner," and proceed to R. and deliver, "the cargo to be discharged in ten working days (weather permitting), commencing, &c. Demurrage at 2*l.* per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The customary rate of loading at W. was proved to be twenty tons a day :—

*Held*, that the clause for lien and for exemption of the charterer applied only to demurrage at the port of discharge, not to damages for delay at the port of loading.

## APPEAL from the Liverpool County Court.

The action was brought to recover damages for detention under a charterparty made on the 16th of March, 1874, between the master of the plaintiff's ship *Zoe*, of 138 tons measurement, and the defendant, by which the ship was to proceed to Weston Point, and there load a cargo of salt of 250 tons, "in the customary manner," and proceed with the same to Riga Bridge, and there deliver, "the cargo to be discharged in ten working days (weather permitting), commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2*l.* per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship."

The vessel proceeded to Weston Point on the 20th of March, and notice was given on the 21st that she was ready to load. No cargo was loaded till the 11th of April, and the loading was not completed till the 20th, when bills of lading were signed (dated the 18th) to the order of defendant or his assigns, "he or they paying freight for the said goods and all other conditions, as per charterparty."

It was proved that the usual dispatch of the port was at least twenty tons per working day for loading; the plaintiff therefore contended that the loading should have been completed on the

4th of April, and claimed damages for detention. The defendant, on the other hand, contended that the claim was one for demurrage, and that his liability had therefore ceased under the charterparty.

The learned judge held that the claim was not for demurrage, and gave judgment for the plaintiff for 44*l.* 2*s.* 8*d.*, being damages for detention at the rate of 2*l.* 15*s.* 2*d.* per day.

Jan. 20. *Gully*, for the defendant. The result of the cases is that, whenever a lien is given for demurrage, the clause absolving the charterer from liability applies: *Gray v. Carr* (1), *Christoffersen v. Hansen* (2), *Francesco v. Massey* (3); and *Bannister v. Breslau* (4), shews that effect will be given to such a stipulation by applying it wherever it appears to be the intention of the parties that the lien should exist, and although the charge may not be strictly demurrage. The lien here covers the delay in loading; the vessel was to load in the customary manner, and it was proved that by the custom of the port a definite time is given for loading. It can make no matter whether a fixed time is specified in the charterparty, or whether terms are used which, when construed by the facts, make the time certain; the result is that a time is fixed by the charterparty. The claim is, therefore, one for demurrage, at the stipulated rate of 2*l.* per 100 tons, which is covered by the lien, and the charterer is released by the delivery on board of the cargo. [He also contended that the plaintiff was estopped by the date of the bill of lading from claiming damages for delay beyond the 18th of April.]

*R. G. Williams, Q.C.*, for the plaintiff. No time is fixed by the charterparty for loading. The words "in the customary manner," do not refer to the time, but to the manner in which the loading is to take place: *Lawson v. Burness* (5), *Tapscott v. Balfour*. (6) No time being fixed, the claim is not for demurrage, to which the stipulated rate of 2*l.* per 100 tons and the stipulated time of ten days refers, but it is a claim for not loading in a reasonable time, in respect of which no rate and no period is named. The

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(1) Law Rep. 6 Q. B. 522.

(2) Law Rep. 7 Q. B. 509.

(3) Law Rep. 8 Ex. 101.

(4) Law Rep. 2 C. P. 497.

(5) 1 H. &amp; C. 396.

(6) Law Rep. 8 C. P. 46.



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clause, therefore, absolving the charterer from liability does not apply. *Primâ facie*, such a clause relates only to future liabilities: *Pedersen v. Lotinga* (1), *Christoffersen v. Hansen* (2); not to such as have already accrued when the event releasing the charterer takes place. In *Oglesby v. Yglesias* (3), and *Milvain v. Perez* (4), the clause was extended to liabilities already accrued, because the express words of the provision required it; but this will not be done unless there are express words or a plain inference. In *Francesco v. Massey* (5), it was held that the words used had that effect, but there a time was fixed both for loading and discharge, so that there was with respect to both a fixed time from which the ten days' demurrage could be reckoned; and, on the other hand, in *Bannister v. Breslauer* (6), where the same was held, no time was fixed either for loading or discharge, nor was there any demurrage clause, so that if the clause had not been applied to damage for detention, there was nothing to which the word "demurrage" would have been applicable. *Bannister v. Breslauer* (6) has, however, been doubted: see *Gray v. Carr*. (7) In the present case there is a time fixed for discharge, but none for loading; the clause giving a lien and releasing the charterers from liability, is therefore to be limited to the liquidated claim, which might afterwards become due at the port of discharge, and ought not to be extended to the claim for unliquidated damages already accrued.

*Gully*, in reply.

*Cur. adv. vult.*

Feb. 12. The judgment of the Court (Cleasby, Pollock, and Amphlett, BB.) was delivered by

CLEASBY, B. The question in this case is whether the charterer is liable for detention at the port of loading by not loading in the customary manner. There is also a question of amount depending upon the number of days during which the vessel was detained. We think the detention must be taken up to the time when the

(1) 28 L. T. 267; 5 W. R. 290.

(4) 3 E. & E. 495; 30 L. J. (Q.B.)

(2) Law Rep. 7 Q. B. 509.

90.

(3) E. B. & E. 930; 27 L. J. (Q.B.)

(5) Law Rep. 8 Ex. 101.

356.

(6) Law Rep. 2 C. P. 497.

(7) Law Rep. 6 Q. B. 522, at pp. 536, 546, 549.

cargo was loaded, and that the date of the bill of lading is not conclusive.

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There is a clause in the charterparty giving the shipowner a lien for freight and demurrage, and providing that the charterer's liability shall cease upon a cargo being put on board. The question really becomes, whether what may be called the "lien and exemption clause," which no doubt applies to demurrage properly so called, also applies, upon the language of this charter, to a claim for undue detention at the port of loading. A similar question has frequently arisen before, and we should not think of departing from what has been already decided; but it must always be borne in mind that if the language is not the same the decision may not be applicable. There is no case exactly the same as the present one.

The word "demurrage" no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it. When the charterparty contains no clause allowing demurrage at a specified rate at all, it has been held that the word "demurrage" in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister v. Breslauer*. (1) That decision is certainly not applicable to the present case, because we have in this charterparty a demurrage clause, though not a precise one. In the present case the charter provides that the ship shall be discharged in ten working days, and afterwards has these words, "Demurrage at 2*l*. per 100 tons register per day."

It has also been decided that when there is a time specified for loading, and also a time for unloading fixed by its being at the rate of so many tons a day, and afterwards a demurrage clause for a fixed number of days at an agreed price per day, that in that case the exemption clause applies to demurrage, whether at the

(1) Law Rep. 2 C. P. 497.

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port of loading or discharge; but it was thought clear it did not apply to detention beyond the lay days and demurrage days at the port of loading. This was the case of *Francesco v. Massey*. (1) The effect of this decision is, that where there is a clause for demurrage at a specified rate for a certain number of days, and, a number of days being allowed for loading, there can be demurrage in the proper sense at the port of loading, the exemption clause applies to demurrage there.

And if we could read the provision for loading in the present case as fixing a particular time for doing so, the decision would apply at all events to the period, though not specified, to which the demurrage clause might be considered to apply. But we do not think we can read the words that the vessel shall load in the customary manner as equivalent to a provision that she shall load in a certain number of days, or at a certain rate per day, for the purpose of applying the word "demurrage" to a detention beyond that period. Those words do not admit, in our opinion, of an addition that she may remain, if she does not load in the customary manner, for a number of days on demurrage.

The conclusion at which we arrive is, that in the present case the word "demurrage" in the lien and exemption clause must be confined to demurrage days after the ten working days allowed for discharge, and not extended to improper detention at the port of loading.

The decision in the Court below was therefore right, and the appeal must be dismissed.

*Appeal dismissed.*

Attorneys for plaintiff: *Prior, Bigg, & Co., for J. B. Wilson, Liverpool.*

Attorney for defendant: *G. H. Field, for Thomas Etty, Liverpool.*

(1) Law Rep. 8 Ex. 101.

## SAINT v. PILLEY.

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Jan. 23.

*Landlord and Tenant—Fixtures—Trustee in Liquidation.*

A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. The plaintiff bought the fixtures; but, with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff, learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant:—

*Held*, that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures.

INTERPLEADER. Issue tried before Mr. Watkin Williams, Q.C., sitting as commissioner at the Surrey summer assizes, 1874.

The facts were as follows:—The property in question consisted of fixtures in a house in Fore Street, in the city of London, which had been held on lease by a firm of Huntley & Saint. The firm went into liquidation, and the trustee put up the whole effects of the firm for sale by auction.

On the 25th of July, 1873, under conditions of sale, one of which was, "All the lots to be taken and cleared with all faults, at the purchaser's expense, within two days after the sale," the plaintiff, who was brother to one of the members of the firm, bought, amongst other things, the greater part of the fixtures: he paid for them on the 15th of August, but by arrangement with the trustee, he did not remove the fixtures, intending to take the premises and set up his brother in business there again. He negotiated with the landlord for this purpose, but failed to come to terms with him, and in October the trustee sent the keys to the landlord, with a note giving up possession of the premises to him. About a fortnight afterwards the plaintiff, hearing what had been done, applied to the landlord for the fixtures which he had bought, and found that the premises had been let to a person, who afterwards let them to the defendant, the fixtures being still



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on the premises, which had till then remained closed. Ultimately an action was commenced by the plaintiff against one Lockyer, who had then come into possession of the premises and the fixtures under the defendant; and Lockyer having taken out an interpleader summons, the present issue was directed.

On these facts a verdict was entered for the plaintiff for the value of the fixtures, with leave to the defendant to move to enter the verdict for him, the Court to have power to draw inferences. A rule having been obtained accordingly,

*Gore and Plumpton* shewed cause, and contended that by the sale to the plaintiff the property in the fixtures had vested in him: *Hallen v. Runder* (1); that the act of the trustee was not a disclaimer under the Bankruptcy Act, 1861, s. 23, and that if it had been intended as such it could not have divested the right of the plaintiff; that it amounted, at the utmost, only to a surrender, which was completed by the acceptance of the landlord, and the new tenancy; that such a surrender could have no effect on rights already acquired for good consideration from the tenant; and that the right to remove as against the landlord was not lost, a reasonable time for removal not having, under the circumstances, elapsed since the termination of the tenancy and its communication to the plaintiff: *London and Westminster Loan and Discount Co. v. Drake*. (2)

*Philbrick, Q.C.*, and *W. A. Lewis*, in support of the rule, admitted that there was no disclaimer under the Bankruptcy Act, 1861, s. 23, and that what was done by the trustee could not therefore have the retrospective effect given to a disclaimer by that section: but contended that all that the plaintiff bought was the right to enter and remove the fixtures, which right ought, under the conditions of sale, to have been exercised within two days, but ought, at any rate, to have been exercised during the continuance of the term, or at least of the possession: *Leader v. Homewood* (3); and that *London and Westminster Loan and Discount Co. v. Drake* (2) did not apply, because in that case there

(1) 1 C. M. & R. 266.

(3) 5 C. B. (N.S.) 546; 27 L. J.

(2) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 316.  
(C.P.) 297.

was no such stipulation for the removal of the fixtures as in the present case.

They also contended that certain of the fixtures were not trade fixtures. [They also cited Amos on Fixtures, 2nd ed. p. 239.]

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CLEASBY, B. On the evidence we must take it that all the articles were of such a nature as the tenant had a right to remove. The question is, how far that right has been lost by reason of the neglect of the plaintiff as against the landlord to remove them within a reasonable time. Now what took place was this: it was not intended to remove them at all; they were bought by the plaintiff in the hope that, as there was a bankruptcy, and as the trustee would not be likely to continue the business, there would be an opportunity of taking the premises and setting up the bankrupt in business there again. Negotiations for this purpose were carried on with the landlord for about two months; then, fourteen days after the surrender by the trustee, the goods were applied for and possession of them was refused, and subsequently a formal demand was made. It is sufficient to say that at the earlier period the plaintiff was in time, and that is enough to prevent the plaintiff from losing his right of removal.

The real question between the parties is the title to these articles; and it is quite plain that the surrender did not forfeit the right which the vendee of the property had acquired. The general maxim is laid down in Co. Litt. 338 b: "Having regard to the parties to the surrender, the estate is absolutely drowned . . . But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance." Therefore, though the term was surrendered, yet the plaintiff's right was not affected; the defendant came into possession of the premises with chattels upon them, which were subject to the rights of a third person. The case of *London and Westminster Loan and Discount Co. v. Drake* (1) is an authority which applies to the present case, and we could not decide on the

(1) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.

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ground taken by Mr. Philbrick without, in effect, overruling that decision. The rule must, therefore, be discharged.

POLLOCK, B. I am of the same opinion. The first question is whether the goods were fixtures which the tenant was entitled to remove, which is a question partly of fact and partly of law; we have power to draw inferences, and, looking at the character of these articles, I am of opinion that they were such. The second question is as to the effect of the note sent to the landlord by the trustee; and I have come to the conclusion that, though it was not a disclaimer, yet being consented to and acted upon, it was valid as evidence of a surrender by operation of law. Thirdly, assuming there was a surrender by operation of law, what were the rights of the plaintiff? Now the right of a tenant has long been considered as more than a bare right to remove. In *Poole's Case* (1), Lord Holt lays down that "this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might; and the reason is because in that case the tenant hath only a bare power without an interest; but here the underlessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell." The tenant has, therefore, an interest in the fixtures which may well be the subject of an assignment. If so, then the passage from Co. Litt. 338 b., cited by Willes, J., in *London and Westminster Loan and Discount Company v. Drake* (2), applies, and is not only binding upon us, but is agreeable to the true notions of what is right and equitable. But Mr. Philbrick argued that the plaintiff had either abandoned this right or been deprived of it by laches. To determine this, we must look at the whole circumstances of the case; and I am of opinion that the plaintiff did all that a reasonable man could be expected to do.

AMPHLETT, B. I am of the same opinion. The tenant was entitled during his tenancy to remove the fixtures. On his becoming bankrupt, the trustee might have disclaimed; he would then have had no further interest in the fixtures, and by s. 23

(1) 1 Salk. 368.

(2) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.

of the Bankruptcy Act, 1869, the disclaimer would have taken effect from the date of the order. But before anything like a disclaimer, he sold the fixtures; and if it were necessary to decide the point, I should be disposed to agree with the view taken in *Amos on Fixtures* (2nd ed. p. 239), that after the sale of the fixtures he could not have disclaimed, because he would have dismantled the house. That question, however, does not arise, because it is admitted there was no disclaimer. But as to the fixtures, the plaintiff having bought and paid for them, the property in them vested in him, and he had the same right of removal which the tenant had had. Subsequently the trustee took on himself to surrender the term to the landlord, and the question is whether this surrender, though good as regards the tenant, could prejudice a third person who had derived an interest for value from the tenant through the trustee. It is a well-known rule that a man cannot derogate from his own grant, and the surrender to the landlord must therefore be subject to the sale previously made to the plaintiff. I should without hesitation apply that rule if there were no decision to that effect; but we have an express authority in *London and Westminster Loan and Discount Co. v. Drake*. (1)

But, again, it is said that the right of removal must be exercised within a reasonable time after the surrender, or rather, for this is the proper period to look to in this case, after notice of the surrender, and that this was not done. I think, however, that the plaintiff did apply within a reasonable time, and that he is not therefore debarred from asserting his right to the fixtures.

*Rule discharged.*

Attorney for plaintiff: *J. M. Green.*

Attorneys for defendant: *A. J. Baylis & Son.*

(1) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.



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Feb. 10.

## MACKENZIE v. WHITWORTH.

*Marine Insurance—Re-insurance—Policy—Interest.*

An underwriter "on goods" may re-insure by the same description; and the policy need not be expressed to be a re-insurance.

THIS was an action on a policy, dated the 24th of April, 1873, and effected with the defendant by the plaintiff through his agents, as well in their own names as for and in the name and names of all and every other person to whom the same did appertain, "at and from New Orleans to Revel *upon goods*, beginning the adventure upon the said goods from the loading thereof on board the ship *Southampton* at as above," the policy being a valued one for 5000*l*.

The declaration, after stating the policy, averred that The United States Lloyd's and Individual Underwriters of New York were interested in the said goods, and that the policy sued upon was made for the use and benefit and on account of the persons so interested.

The defendant pleaded, amongst other pleas, 4, denial of the interest alleged; 8, concealment that the interest was that of insurers.

At the trial of the cause before Pollock, B., at the Liverpool summer assizes, 1874, it appeared that The United States Lloyd's and Individual Underwriters of New York had underwritten a policy on the goods mentioned, being cotton to be shipped by Messrs. Putnam & Co., of New Orleans, to the amount of 80,000*l*., and that the policy in question was effected for them to cover a portion of their risk, of which they still held 20,000*l*.

Evidence was given on the part of the defendant, which was not contradicted, and it was in fact admitted on the part of the plaintiff that in all cases of re-insurance policies the invariable practice had been to disclose the fact that the policy was for re-insurance; and it was proved that the plaintiff, at the time of the insurance, knew that such was the nature of the policy in question, but that this fact was not communicated to the defendant.

Evidence was also given, both on the part of the plaintiff and

the defendant, as to whether this was a fact material to the risk or material to be communicated to the defendant; and in particular the defendant gave evidence that he would not have underwritten the policy if he had known that it was a re-insurance, and that it was the practice of many underwriters to refuse re-insurances.

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Cotton to the value insured by The United States Lloyd's and Individual Underwriters of New York was shipped at New Orleans; the ship sailed on the 28th of February, 1873, and was, with the cargo, destroyed by fire on the 19th of March.

The learned judge ruled that the interest of The United States Lloyd's and Individual Underwriters of New York was sufficiently described in the policy, and left to the jury the question of concealment. The jury found for the plaintiff on all the issues of fact, and a verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him.

A rule having been obtained accordingly, on the ground that the plaintiff, being only interested as an insurer, was not entitled to recover on the policy sued on,

*Benjamin, Q.C.*, and *Myburgh*, shewed cause. The objection that the policy was not stated to be a re-insurance cannot be rested on the ground that a material circumstance was not disclosed, because the jury have found for the plaintiff upon the plea of concealment. The objection, therefore, must be that as a matter of law a policy of re-insurance must be so described, or that the interest of the assured must be described as an interest in re-insurance. But the true rule of insurance law is that the subject-matter of insurance only need be described; in general, the interest of the assured in that subject-matter need not: *Arnould on Mar. Ins.* 4th ed. vol. i. p. 21; *Phillips on Ins.* art. 415. Thus it is the constant practice for carriers, bailees, and mortgagees to insure without describing their interest, and to recover according to the extent of their interest. The general rule is so laid down expressly in *Crowley v. Cohen* (1) in the case of carriers, and in substance

(1) 3 B. & Ad. 478, at p. 485, per Lord Tenterden, C.J.

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that case is identical with the present, because the interest of carriers is only their liability over as insurers of the goods they carry. The case of warehousemen is similar; their interest is their liability to those who have entrusted goods to them. If, therefore, an insurer effecting a re-insurance is bound to describe the nature of his interest, it is, with one exception, the only case in which a statement of the nature of the interest is required. That exception is in the case of bottomry and respondentia, which is always treated as an exceptional instance, and is expressly stated to be such by Lord Mansfield, C.J., in the case in which the point was established: *Glover v. Black*. (1) That case was decided entirely on a usage and practice said to prevail among merchants that bottomry and respondentia must be insured *eo nomine*; and that the decision was founded on this, and not on general principles, is shewn by the subsequent case of *Reed v. Cole* (2), where the policy was in substance nothing else but a re-insurance. Further, the custom proved or admitted in the present case is entirely accounted for by the statutory rule which prevailed till very recently. By 19 Geo. 2, c. 37, s. 4, all re-insurance was prohibited, except in certain cases, and in those cases it was allowed only "provided it be expressed in the policy to be a re-insurance." The prohibition was removed by 27 & 28 Vict. c. 56, s. 1; but the proviso remained in force until 30 & 31 Vict. c. 23, sched. D, repealed the whole section, which was also included in the schedule to 30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867). Therefore, until 1867, the statement in the policy that it was a re-insurance was required by statute (which of itself tends to shew that it was otherwise unnecessary), and no inference can be drawn from the usage of mentioning it during that time, or from the survival of that usage since. This case, therefore, falls within the general rule, and not within any exception to it; and this is the opinion of Phillips on Ins. art. 498, referring to *New York Bowery Fire Insurance Co. v. New York Fire Insurance Co.* (3) [He also referred to *Anderson v. Morice*. (4)]

(1) 3 Burr. 1394.

(2) 3 Burr. 1512.

(3) 17 Wend. 359.

(4) Law Rep. 10 C. P. 58.

*Herschell, Q.C.*, and *Baylis*, in support of the rule. The subject-matter of the policy is not properly described. The case of bailees, carriers, and others having a possessory interest in the goods is not in point. Having a real interest in the goods themselves, an insurance effected by them may be properly described as an insurance on goods, and the additional interest which they have in respect of their liability over does not make that description incorrect: *London and North-Western Ry. Co. v. Glyn*. (1) The same is true with respect to mortgagor and mortgagee; the one is the owner of the ship, the other is an incumbrancer upon it with a power of sale, and clearly has an interest in it. But an insurer has no interest in the goods themselves; his interest is only in a contract by which, in consideration of premiums, he undertakes to indemnify against their loss or damage. He may be said to have an interest in the event of the safe arrival of the goods, but not in the goods themselves. In countries where re-insurance has been constantly allowed, it is in general not only customary, but necessary by law to describe the policy as one of re-insurance: see Arnould, *Mar. Ins.* 2nd ed. vol. i. p. 340, n. (z). The case cited by Phillips of *New York Bowery Fire Insurance Co. v. New York Fire Insurance Co.* (2) does not bear out the proposition for which he quotes it; it is true that the policy was on goods, but it was stated on the face of it to be a re-insurance. Moreover, in that case the policy was successfully attacked on the ground of the noncommunication of facts relating to the original assured; the chief importance therefore of the case is that it shews the propriety of informing the underwriter that it is a re-insurance. And, though Phillips inclines to the opposite view, he cites Christian as an authority that "a re-assurance must be expressly mentioned to be a re-assurance in the policy." But even assuming that the interest of an insurer could independently of custom be properly described as an interest in goods, the general usage and custom among underwriters would make the description improper. The reason of the decision in *Glover v. Black* (3) applies to the present case. If, on the ground that it was the usage to insure

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(1) 1 E. & E. 652; 28 L. J. (Q.B.)  
188.

(2) 17 Wend. 359.  
(3) 3 Burr. 1394.



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bottomry and respondentia eo nomine, it was held that a policy on respondentia describing it merely as "goods" was bad, the same result will follow with respect to re-insurance. A contract is to be interpreted according to the intention of the parties as expressed in the ordinary terms of mercantile dealing; and if by mercantile custom and usage a contract of re-insurance is not described merely as an insurance on goods, the underwriter cannot be bound by a contract of re-insurance so expressed; he never intended to be so bound, and the contract is not one which, interpreted according to usage, so binds him. It can make no matter how the custom originated, if it exists, and the fact that till lately it was necessary by statute to state 'the policy to be a re-insurance only shews the universality of the custom, and makes it the more certain that the mercantile interpretation of an ordinary insurance on goods excludes re-insurances. The express mention of re-insurance in 30 Vict. c. 23, s. 4, also shews the common understanding. The description in this policy is therefore neither in itself a proper one, nor, if otherwise proper, is it one which, as interpreted by the custom prevailing among underwriters, properly expresses the intention of the defendant to become a party to a policy of re-insurance.

BRAMWELL, B. I am of opinion that this rule must be discharged. It is admitted that, as a general rule, a policy of marine insurance must contain a description of the ship, the subject-matter of the insurance, the voyage, and the perils insured against, and the assured, if challenged, must shew the extent of his interest. A policy of marine insurance is said to be an instrument which has a meaning by custom, and if you were to prepare a new form you would say that, in consideration of such and such a premium, the underwriter undertakes to indemnify the assured against the risk of a certain loss occasioning damage to him. That means that you must state the ship, the subject-matter of insurance, the risk or voyage, and the perils insured against. Now here that has been done, because the plaintiff says, "What I want to be insured against, is the non-arrival of the goods described." Therefore, it is rather for the defendant to make out that there is

some cause why an exception to the general rule should be introduced in his favour, than for the plaintiff to make out that he has done all that can be required of him. The defendant seeks to make this out on a ground which, if good at all, goes rather to the question of concealment than to anything else. He says, "It is true you are interested in the arrival of the goods, and will be damaged by their non-arrival, or arrival in a damaged condition; but you have concealed from me that you were not what those who insure generally are, that is, an owner, but were only an insurer." Now, if that is a good reason for the underwriter to advance, then the jury should have found for the defendant, on the ground of concealment; and it may be that there is good reason why they should find that it is material to the underwriter that he should know that the policy is a re-insurance. But there is no rule on the ground that the verdict is against the weight of evidence. If, however, it is immaterial, then I cannot very well see why it should be stated in any shape, and I should not be very ready to introduce another anomaly into the law relating to the preparation of policies of insurance in favour of something that is immaterial, especially since the underwriter may put in any clause that he thinks necessary for his protection, and might, if he thought fit, have inserted the words "warranted not a re-insurance." The case therefore stands thus: if it is material, the jury should have found against the plaintiff on the issue of concealment; if it is immaterial, it is not for us to introduce an anomaly into the general law when the underwriter may guard himself by express words.

The authorities, it seems to me, are strong in the plaintiff's favour. There is the case of the carrier who is at liberty to insure goods in the same way that an owner would, without stating that his interest is his liability over to the owner. I have not forgotten the ingenious argument of Mr. Herschell with respect to the possessory interest of a bailee of goods; but the answer is, that if he insured nothing but his possessory interest he could only recover a nominal amount; that he may and does recover substantial damages shews that he is insuring in respect of his liability to the owner. So, in the case of the mortgagor

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and mortgagee of a ship ; they can both insure, and can recover in respect of their respective general interests in the ship. The rule, indeed, is that you must specify the subject-matter of insurance, not your interest in it, and this is so laid down in the passages in Arnould and Phillips cited by Mr. Benjamin.

The only case relied on for the contrary proposition is one which we must treat with great respect, but I must confess I do not understand the principle of the decision. It is the case of *Glover v. Black* (1), where it was held that in an insurance of respondentia it must be so described. It was so held under peculiar circumstances, and apparently in consequence of an understanding said to prevail among merchants, that where respondentia was insured, it was insured eo nomine, and was not described as an insurance on goods. If so, I should have thought it was a matter that went to concealment, for I do not see how the practice of merchants could make the statement in the policy erroneous. However, if the question here arose on an insurance of respondentia, we would follow that case, and leave the plaintiff to error. But it is not such ; and Lord Mansfield expressly says, in *Glover v. Black* (1), that the decision is not to be taken as laying down a general rule. If so, the case is one decided on the ground of convenience and with reference to the particular mercantile understanding referred to, and does not govern that now before us ; and it is no authority in favour of introducing a second anomaly into the law of insurance. Therefore the rule must be discharged.

POLLOCK, B. I am of the same opinion. The finding of the jury was that there was no concealment in not stating that the policy was a re-insurance. This observation is of considerable weight, because it excludes any argument tending to shew that there was any substantial increase over the contemplated risk, or any difference in the premium, in consequence of the fact being withheld.

The question of law, therefore, which we have to decide is, whether by any known practice, or by any rule of law, the person effecting a policy of re-insurance, is bound to state that it is a re-

insurance. It is not contended, nor could it be, that he is bound to state the risk to be on re-insurance, but it is said that he ought to state the policy to be a second insurance, and that otherwise he cannot recover upon it. Is there, then, any authority for this proposition? I can find none. Re-insurance has been known almost as long as insurance, and (except during a certain period in our own country) it has been practised all over the world. The general rule is that it is the duty of the assured to state the subject-matter of insurance, and then, before he can avail himself of the fruits of his policy, he must go further, and shew the extent of his interest. Emerigon, ch. 8, s. 14, cites the Ordonnance in these terms: "It shall be allowable to insurers to re-insure with others the *effects* they have insured" (1); and Pothier, *Traité d'Ass.* art. 35, says: "C'est par le même principe qu'on ne peut faire assurer que ce qu'on risque de perdre, qu'un assureur peut bien faire réassurer les *effets* qu'il a assurés, parce que la perte qui en peut arriver, est pour lui une perte qu'il court risque de faire." This takes for granted that the re-insurance is an insurance on the "effects," although the interest of the assured is different. In English law there are abundant illustrations of this rule. The carrier who has only a partial interest in the goods, the vendor who may have parted with his property in the goods, the bailee who never had any property in them, the mortgagor and mortgagee of the ship, may insure and may recover according to their respective interests. In *Reed v. Cole* (2), where a member of a mutual assurance society had parted with his vessel before the loss, he was held entitled

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(1) In chap. 10, s. 11, Emerigon says: "The Ordonnance requires a special stipulation on the subject of the tenth whenever this is intended to be insured (Ord. 18, 19). It is the same with freight earned, which the Declaration of 1779 allows to be insured. So also with the sum which one causes to be re-insured." The text of the Ordonnance is as follows:—Liv. 2, tit. 6, art. 18: "Les assurés courront toujours risque du dixième des effets qu'ils auront chargés, s'il n'y a déclaration expresse dans la police qu'ils entendent

faire assurer le total. 19. Et si les assurés sont dans le vaisseau, ou qu'ils en soient les propriétaires, ils ne laisseront pas de courir risque du dixième, encore qu'ils aient déclaré faire assurer le total. 20. Il sera loisible aux assureurs de faire réassurer par d'autres les effets qu'ils auront assurés, de faire assurer le coût de l'assurance et la solvabilité des assureurs;" nothing being said in the Ordonnance as to a declaration in the case of re-insurance.

(2) 3 Burr. 1512.



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to recover on the articles of agreement, because he was still a member, and "continued contributory to the losses of the others," and "still had an interest in the safety of the ship," because he had agreed with the purchaser to pay 500% if a loss happened within three months. "He had not parted with all his interest in it, but continued interested quoad this loss." In that case he was no more an owner of the vessel than any other person in the world; but he had undertaken a liability contingent on the safety of the ship, and was therefore held entitled to recover. This was decided shortly after *Glover v. Black* (1), and is an authority to shew that that decision was not intended to impair the general rule that it is sufficient to set forth the subject-matter of insurance.

In *Glover v. Black* (1) it was no doubt held that one who had advanced money on respondentia could not insure it without stating the insurance to be on respondentia. We must pay all respect to that decision, but it is to be observed that for some time previously there had been a great jealousy as to money borrowed on ships and cargoes, both with respect to those who borrowed and those who lent. Merchants were often mere adventurers who, having paid nothing for the goods shipped, immediately insured them, and those who had advanced the money insured their advance at maritime interest. Wager policies and gambling insurances were of frequent occurrence. This is a practice which all writers on insurance law have set themselves against, as may be seen in Emerigon (2) and Pothier (3), and art. 347 of the Code de Commerce. (4)

It was in that state of circumstances that the case came before the Court, and it was no doubt treated by the Court as a fact that there was a general usage and understanding of merchants that an insurance of respondentia or bottomry should be so described. Lord Mansfield was at first very much inclined to support the policy; and in deciding against it he said, "It is established now,

(1) 3 Burr. 1394.

(2) Emerigon, ch. 8, s. 11.

(3) Poth. Tr. de l'Ass. art. 31.

(4) Code de Com. art. 347: "Le

contrat d'assurance est nul s'il a pour objet . . . les profits maritimes des sommes prêtées à la grosse."

on the law and practice of merchants, that respondentia and bottomry must be mentioned and specified in the policy of insurance," but he added, "they did not mean to determine that no special interest in goods may be given in evidence in other cases than those of respondentia and bottomry, if the circumstances of the case shall admit of it." It is remarkable that in the same court, about twenty years afterwards, in the case of *Gregory v. Christie* (1), cited in Park on Ins. 8th ed. pp. 11, 104, it was held that where a policy contained the words "goods, specie, and effects," the assured was entitled, on the ground of "express usage," to recover a sum of money advanced by the master for the benefit of the ship, and for which he charged a respondentia interest; and Buller, J., cites *Glover v. Black* (2) as an authority for the decision. The meaning, therefore, of *Glover v. Black* (2) is, that it was the practical interpretation of policies of insurance in trade that in a policy the words "goods and merchandises" did not describe respondentia. Therefore respondentia and bottomry rested on some peculiar grounds. The case of re-insurance rests on none, unless we remove away from merely legal grounds to grounds of fact, and consider whether it is material to the underwriter that he should know it to be a re-insurance, and then, cadit quæstio, because the jury have found it to be immaterial.

AMPHLETT, B. I was for some time doubtful, but I am now satisfied that my doubts were not well grounded. My doubt was whether the subject-matter of insurance was sufficiently described in the policy; for no doubt to common apprehension there is a great difference between an insurance on goods and an insurance on the risk which the assured is to incur as insurer of these goods, and cases might be put where a very different defence might arise on the two policies. But I have come to the conclusion that the fact of the policy being a re-insurance is only a limitation on the liability of the second insurer, and does not make his risk cease to be a risk on goods.

Then the question arises, whether the existence of a custom that it should be mentioned would affect the policy? And I agree

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(1) 3 Doug. 419.

(2) 3 Burr. 1394.

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there is a very great deal in favour of the view that this may affect the question, not whether as a matter of law the policy is void, but whether the policy is void by reason of concealment of a material fact. It is impossible not to see that, even though the risk were the same, it would be convenient for the underwriter to know that the risk he was insuring was only the risk of the first insurer; and there is no doubt a notion prevailing that it is right and proper that the fact of the first insurance should be mentioned. And that it is right and proper derives support from the proviso in 19 Geo. 2, c. 37, s. 4. There appears also to be reason to say that this practice prevails very generally throughout the world. But although no doubt there is a notion widely prevailing that it is right and proper the fact should be mentioned, and we have what is equivalent to a finding, namely, an admission by Mr. Benjamin at the trial, that it is a very general usage and practice to mention it; yet, as the jury have found that there was no undue concealment, and as there is no rule questioning the verdict on that point, we must assume that the finding is right. The rule must therefore be discharged.

*Rule discharged.*

Attorneys for plaintiff: *Norris, Allen, & Co., for Simpson & North, Liverpool.*

Attorneys for defendant: *Gregory & Co., for Hull, Stone, and Fletcher, Liverpool.*

## [IN THE EXCHEQUER CHAMBER.]

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Feb. 11.CURRIE AND OTHERS *v.* MISA.

*Pre-existing Debt—Cheque given on Account of—Negotiable Security payable on Demand.*

The title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bonâ fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand.

Judgment of the Court below affirmed (Lord Coleridge, C.J., dissenting).

APPEAL by the defendant against the decision of the Court of Exchequer, refusing to grant a rule nisi to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, or a nonsuit.

The action was brought to recover 1999*l.* 3*s.* upon a cheque of the defendant and interest thereon.

The declaration stated that the defendant, on the 14th of February, 1873, by his cheque or order for the payment of money directed to Messrs. Barnetts, Hoares, Hanburys, & Lloyd, bankers, required them to pay to F. de Lizardi & Co., or bearer, 1999*l.* 3*s.*, and that the plaintiffs became the bearers of the said cheque, and the same was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Pleas: 1. Denial that the plaintiffs became the bearers of the said cheque as alleged.

3. That there never was any consideration for the making or payment of the cheque by the defendant, and that F. de Lizardi & Co. delivered the cheque to the plaintiffs to hold the same as the agents of and on account of F. de Lizardi & Co., and not as bearers or transferees thereof. And that the plaintiffs presented the cheque for payment to the defendant as such agents for and on account of F. de Lizardi & Co., and not as the bearers or transferees thereof. And that when the cheque was presented for payment to the defendant, and dishonoured by him, the plaintiffs had notice that there never was any consideration for the making or payment of the cheque by the defendant.



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4. That the defendant was induced to draw the cheque and to deliver the same to F. de Lizardi & Co. by the fraud of F. de Lizardi & Co., and that the plaintiffs were and are the bearers of the cheque, and have always held the same without giving any consideration for the same.

5. That there never was any consideration for the defendant's making or paying the cheque, and that the plaintiffs became and are the bearers of the cheque, and have always held the same without having given any consideration for the same.

Issue: and demurrer to third plea and joinder.

The cause was tried at the London sittings at Guildhall, after Michaelmas Term, 1873, before Kelly, C.B., when the following facts were proved:—

The plaintiffs are bankers, carrying on business in Lombard Street, London, under the firm of "Glyn, Mills, Currie, & Co." The defendant is a wholesale wine merchant, carrying on business in London and at Xerez, near Cadiz, in Spain. Joseph Javier de Lizardi was a general merchant, who was a partner of or traded under the firm of "F. de Lizardi & Co.," which was established in London, and carried on a very extensive business with East Spain and the Continent generally, and dealt largely in bills upon foreign countries. In the month of February, 1873, the plaintiffs were, and for more than thirty years previously had been, the bankers of F. de Lizardi & Co., whose credit was extremely high. They had two accounts with the plaintiffs, namely a loan account and a drawing account, and down to the month of December in that year usually had a considerable balance in the plaintiffs' hands. Early in 1873 Lizardi began to get into difficulties, and on the 3rd of February in that year he overdraw his drawing account with the plaintiffs, being then, and having for some time previously been, also indebted to them on his loan account. From the 3rd of February down to the 12th, 1873, he obtained large additional advances from the plaintiffs upon securities of various kinds deposited with them, and on the 12th of February, at the close of the day, Lizardi was indebted to the plaintiffs in the sum of 83,436*l.* 13*s.* 8*d.*, of which 49,000*l.* was due on the loan account and 34,436*l.* 13*s.* 8*d.* upon the drawing account.

Early in February, 1873, the defendant was at Xerez, near

Cadiz, in Spain, and on the 11th of February, being desirous of having a remittance of about 2000*l.* made from London to Cadiz, he on that day, by telegraph, instructed Mr. Pritchett, who had the general management of the defendant's business in London during his absence, to purchase from Lizardi drafts on Cadiz to about the sterling value of 2000*l.* Accordingly on the same day, Tuesday, the 11th of February, Mr. Pritchett instructed Mr. Goodban, the defendant's bill broker, to apply to Lizardi for drafts on Cadiz to the amount of about 2000*l.* Mr. Goodban thereupon, on the same Tuesday, effected a contract between Lizardi and the defendant for the sale or delivery by Lizardi to the defendant of drafts to the amount of about 2000*l.* sterling, at an agreed rate of exchange, from London to Cadiz, to be at 15 days' date, and delivered the usual contract notes to the respective parties.

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In the afternoon of the same day, the 11th of February, in pursuance of the above-mentioned contract, a clerk in the employment of Lizardi left at the defendant's office in London four drafts dated on that day, drawn by Francisco Lizardi in the name of F. de Lizardi & Co., upon Mr. Manuel Paul, Cadiz, for an amount in Spanish money equivalent at the aforesaid rate of exchange to 1999*l.* 3*s.* These drafts were forwarded by the evening post of the same day to the defendant, at Xerez, near Cadiz.

It is customary in London to pay for drafts and bills on foreign countries, purchased or obtained through a bill broker, on the post day next after the day of the contract. There are two post days, namely, Tuesday and Friday, in each week; consequently, according to the usual course of business, the purchase or consideration money for the four drafts so contracted for on Tuesday, the 11th, was payable on Friday, the 14th of February.

After banking hours on the 12th of February, the plaintiff, Bertram Wodehouse Currie, who for many days previously had been urgently pressing Lizardi to reduce the amount of his indebtedness to the plaintiffs, and who on that day for the first time suspected (as the fact was) that some of the securities deposited with the plaintiffs were not genuine, had an interview with Lizardi, and represented to him that he had a suspicion that some of the securities were not genuine, and again pressed Lizardi to reduce his balance. Lizardi assured Bertram Wodehouse Currie that he

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was mistaken in his suspicions, and handed him a list of the securities, detailing their values, and shewing a large margin over the plaintiffs' advances. Bertram Wodehouse Currie still pressed Lizardi to reduce his debt.

In the course of Thursday, the 13th of February, Lizardi paid into the plaintiffs' bank, to the credit of his drawing account, the sum of 6925*l.* 5*s.* 8*d.*, in two cheques for 425*l.* 5*s.* 8*d.*, and 6500*l.*; and about two o'clock on that day he handed to Currie, in the plaintiffs' bank parlour, in Lombard Street, the following document, partly written and partly printed, impressed with a penny stamp:—

“London, 14th February, 1873.

“M. Misa, Esq., 41, Crutched Friars.

“Please to pay to Messrs. Glynn, Mills & Co., or bearer, the sum of Nineteen hundred and ninety pounds, three shillings, for bills negotiated to you last post.

“F. de Lizardi & Co.

“1999*l.* 3*s.*”

The words in the document “for bills negotiated to you last post,” refer to the four drafts previously mentioned. The plaintiffs, however, did not know by or upon whom the bills were drawn, but supposed that the money was due from the defendant to Lizardi for bills negotiated.

Bertram Wodehouse Currie deposed at the trial that it was usual for Lizardi to sell bills on the Exchange, and then to draw an order, like that above set out, on the purchaser of the bills, and that that is the course of business when bills are sold; and that such orders are sometimes accepted by writing “accepted” across them, that is, by the person on whom they are drawn writing his name across the paper, making it payable at his bankers.

In the course of the same day, Thursday, the 13th of February, cheques drawn and bills payable by Lizardi, to the amount of 8326*l.* 3*s.* 7*d.*, were presented to the plaintiffs' clerk, at the bankers' clearing-house, in London, for payment, and were left in the ordinary course of business in his hands. Bankers do not after 4 p.m. receive any cheque or bill for presentation at the clearing house, but they have the option of refusing to pay any cheque or

bill which may have been presented for payment during the day, and returning the same, unpaid, up to 5 p.m.

Shortly before 5 p.m. of the same Thursday, the plaintiffs gave orders to their clerk at the clearing-house not to pay the cheques or bills of Lizardi, which had been presented to the plaintiffs for payment in the course of the day, and thereupon the whole of them were returned unpaid, and Lizardi in this manner stopped payment. In fact the plaintiffs did not honour any cheques or bills of Lizardi, or pay anything on his account, after the 12th of February.

On Friday morning, the 14th of February, one of the plaintiffs' clerks left at the defendant's office in London a notice upon a printed form, of which the following is a copy:—

“Light gold cannot be received. A bill on [M. Misa] for [1999l. 3s. 0d.], drawn by [de Lizardi & Co.] (1) lies due at Messrs. Glyn, Mills, & Co., No. 67, Lombard Street. Please to call between two and four o'clock, and on Saturdays before three.”

Between 2 p.m. and 3 p.m., of the same Friday, the plaintiffs sent one of their messengers to the defendant's office in London with the document dated February 14th, to inquire whether it would be paid. The messenger saw Mr. Pritchett, the defendant's manager, who stated that it would be paid; offered to give the messenger a cheque for the amount, and, with indignation, asked, “Why the question was asked?” The messenger replied that he did not know, and that he was not authorized to take the cheque. The messenger, taking back with him the document, then returned to the plaintiffs' bank, and there reported what had taken place at the defendant's office.

About an hour after the plaintiffs' messenger had left the defendant's office, Mr. Pritchett drew a cheque in the defendant's name upon his bankers, Barnetts, Hoares, Hanburys, & Lloyd, for the sum of 1999l. 3s., payable to F. de Lizardi & Co., or bearer, which is the cheque sued on, and sent the same to the plaintiffs' bank by a clerk, who, shortly before 4 p.m. of the same day, Friday, handed the cheque to a clerk in the plaintiffs' bank and received the document dated February 14th in exchange, and

(1) The words and figures in brackets were written.



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thereupon the amount of the cheque was entered in the plaintiffs' books to the credit of Lizardi.

The plaintiffs, upon receiving the defendant's cheque, sent the same to the clearing-house, where, about 4 p.m. on the same day, it was presented for payment, and handed to a clerk of Barnetts, Hoares, Hanburys, & Lloyd.

At the time Mr. Pritchett sent the defendant's cheque to the plaintiffs' bank he did not know that Lizardi had stopped payment, but being very soon afterwards informed of the fact, he at once instructed the defendant's bankers not to pay the defendant's cheque, and the same was accordingly refused payment and returned unpaid to the plaintiffs before 5 p.m. on the 14th February, and the amount thereof was, on the morning of the following day, entered in the plaintiffs' books to the debit of Lizardi.

Up to this time the plaintiffs did not know whether Lizardi was solvent or not. At an interview which the plaintiff, Bertram Wodehouse Currie, had with him on the said 14th of February, he protested that he was solvent. This statement was doubted by Bertram Wodehouse Currie.

Shortly after the 13th of February, when Lizardi stopped payment he absconded, and was subsequently adjudicated a bankrupt, his liabilities amounting to upwards of a million sterling, and his assets amounting to very little indeed.

The document dated February 14th has never been returned to nor demanded by the plaintiffs, and is still in the possession of the defendant.

The following admissions in writing were made by the parties before the trial, namely:—That the four drafts purchased by the defendant from Lizardi as afore-mentioned were duly presented for payment to Manuel Francisco Paul, at Cadiz, on whom they were respectively drawn by F. de Lizardi & Co. on the day they respectively became due, and that they were then and there respectively refused payment and were respectively dishonoured by Manuel Francisco Paul, and upon the grounds (but without admitting the truth of the grounds) stated in the protest of the 27th of February, 1873; and that the bills were then and there duly protested for non-payment; and that the above facts, as also the

bills and protests, might be given in evidence without calling any witness or witnesses to prove them or any of them.

Some of the securities deposited by Lizardi with the plaintiffs were found to be forgeries, some worthless, and others cannot be realized. The plaintiffs have realized a portion of the said securities which were good, and taking into account the value of the residue, which cannot now be realized, the balance which will ultimately be due from Lizardi to the plaintiffs will be about 20,000*l*.

It was contended on behalf of the defendant at the trial that there was a total failure of consideration as between the defendant and Lizardi for the cheque sued on, and that the plaintiffs were not holders thereof for value; but the learned judge ruled upon the above facts (neither party desiring that any question should be left to the jury) that the plaintiffs were entitled to recover, and directed the jury to find a verdict for the plaintiffs for 2090*l*. the amount of the cheque and interest thereon, and a verdict for that amount was thereupon entered, with leave to move to enter a nonsuit.

In Hilary Term, 1874 (January 14th), the defendant moved the Court of Exchequer, pursuant to the leave reserved, for a rule calling upon the plaintiffs to shew cause why the verdict entered for them should not be set aside and the verdict entered for the defendant or a nonsuit.

The Court (Kelly, C.B., Pigott and Cleasby, BB.) refused a rule, and the defendant appealed.

The Court of Appeal is to be at liberty to draw inferences of fact from the facts above stated.

The question for the opinion of the Court of Appeal is whether a rule *nisi* ought to have been refused or granted.

Dec. 3, 1874. *W. Williams, Q.C. (Cohen, Q.C., and Wool Hill with him)*, argued for the defendant.

*J. Brown, Q.C. (Murray with him)*, for the plaintiff.

The course of the arguments sufficiently appears from the judg-

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ment. The following cases were referred to :—*Crofts v. Beale* (1); *Young v. Cole* (2); *Swift v. Tyson* (3); *Brandao v. Barnett* (4); *Percival v. Crampton* (5); *Poirier v. Morris* (6); *Watson v. Russell* (7); *Whistler v. Forster* (8); *Parsons on Notes and Bills*, vol. i. p. 218.

*Cur. adv. vult.*

Feb. 11, 1875. The judgment of the Court (Keating, Lush, Quain, and Archibald, JJ., Lord Coleridge, C.J., dissenting) was delivered by

LUSH, J. This is an action on a cheque, dated the 14th of February, 1873, drawn by the defendant on Messrs. Barnett, Hoare, & Co., for payment of 1999*l.* 3*s.* to Lizardi & Co. or bearer. The material plea is the 5th, which alleges that there never was any consideration for the defendant's making or paying the cheque, and that the plaintiffs have always held the same without having given any consideration.

We think it must be assumed on the facts stated in the case that if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question therefore is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the cheque for value.

The material facts bearing on this question may be briefly stated. The defendant had purchased of Lizardi & Co. bills on Cadiz, which were delivered to him on the 11th of February, and which, according to the usual course of business, were to be paid for on the next post day, the 14th. Lizardi was at this time largely indebted to the plaintiffs, who were his bankers, on both his drawing account and a loan account, and he had for several days previously to and again on the 12th of February been pressed for payment or further security. On the 13th he paid in various

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| (1) 11 C. B. 172; 20 L. J. (C.P.) 186. | (6) 2 E. & B. 89; 22 L. J. (Q.B.) 313.        |
| (2) 3 Bing. N. C. 724.                 | (7) 3 B. & S. 34; 31 L. J. (Q.B.) 304.        |
| (3) 16 Peters, at p. 16.               | (8) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161. |
| (4) 6 M. & G. at pp. 667-8.            |   |
| (5) 2 C. M. & R. 180.                  |   |

cheques on account of the balance, and at the same time handed to the plaintiffs the document set out in paragraph 13 of the case, which is designated a "bill."

On the morning of the 14th notice of this "bill," described as lying due at the plaintiffs', was left at the defendant's office, and shortly afterwards the cheque in question was paid in by the defendant to the plaintiffs' bank, and the "bill" given up to him in exchange for it. The amount of the cheque was, together with the other cheques paid in by Lizardi, entered to the credit of Lizardi's account, and a large balance still remained owing to the plaintiffs. Soon after paying in the cheque the defendant heard that Lizardi had stopped payment, and he at once instructed his bankers not to honour the cheque. In consequence of this the cheque was returned from the clearing-house in the after-part of the day, and on the following morning (the 15th) it was entered in the plaintiffs' books to the debit of Lizardi's account.

The Court below, in giving judgment for the plaintiffs, proceeded, partly at least, upon the special circumstance that the cheque was given to take up the so-called "bill," and considered that this of itself formed a sufficient consideration to entitle the plaintiffs to recover. The argument before us, however, was addressed almost entirely to the broader question, namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favour of the plaintiffs, we do not think it necessary to say more with reference to the special circumstance adverted to, than that we are not prepared to dissent from the view taken upon this question by the Court below.

It will, of course, be understood that our judgment is based upon what was admitted in the argument, namely, that the cheque was received by the plaintiffs *bonâ fide*, and without notice of any infirmity of title on the part of Lizardi. We, therefore, for the purpose of the argument, regard the so-called "bill" as merely an authority to the defendant to pay the amount to Lizardi's bankers, instead of paying it to him, and treat the transaction as if the cheque had been paid to Lizardi, and he had paid it to

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the plaintiffs, not in order that he might draw upon it, but that it should be applied pro tanto in discharge of his overdrawn account.

It was not disputed on the argument, nor could it be, that if instead of a cheque the security had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American Courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future day implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a cheque payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had.

We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And upon consideration we are of opinion that it has no foundation either in principle or upon authority.

Passing by for the present the consideration of what is the true ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other: Com. Dig. Action on the Case, Assumpsit, B. 1-15.

The holder of a cheque may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately he is safe. The maker of the cheque cannot afterwards

repudiate, and claim back the proceeds any more than he could claim back gold or bank notes if the payment had been made in that way instead of by cheque. This was decided in *Watson v. Russell* (1), with which we entirely agree. In very many—perhaps in the great majority of cases—cheques are not presented till the following day, especially where they are crossed, and this usage is so far recognised by law that the drawer cannot complain of its not having been presented before, even though the banker stop payment in the interval. The loss in such a case falls on the drawer of the cheque, and not on the holder.

It cannot, we think, be said that a creditor who takes a cheque on account of a debt due to him, and pays it into his banker that it might be presented in the usual course instead of getting it cashed immediately, does not alter his position, and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over. If this subject were worth pursuing it would not, we think, be difficult to shew that there is no sound distinction between the two kinds of securities of which we have been treating. In the course of the argument it was put to the learned counsel for the defendant whether a debtor who gave his own cheque [in payment of a pre-existing debt could defend an action upon it on the ground that the creditor was not a holder for value, and Mr. Watkin Williams admitted that his argument must go to that extent, and yet it has always been the practice to sue in such a case on the cheque as well as on the original debt, and no such defence has, as far as we are aware, ever been attempted to be set up, certainly not successfully.

But it is useless to dilate on this point, for, in truth, the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in *Belshaw v. Bush* (2) as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized.

(1) 3 B. & S. 34; 31 L. J. (Q.B.) 304. (2) 11 C. B. 191; 22 L. J. (C.P.) 24.

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This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security. The books are not without authorities in favour of this view, although the point has not, as far as we are aware, been directly decided. Story lays it down in his work on Promissory Notes, s. 186, that a pre-existing debt is equally available as a consideration as is a present advance or value given for the note, without suggesting any distinction between a note payable after date and one payable on demand; and the cases of *Poirier v. Morris* (1), *Watson v. Russell* (2), before cited, *Whistler v. Forster* (3), and others, contain clear expressions of opinion the same way.

On the part of the defendant the case of *Crofts v. Beal* (4) was strongly relied on, where it was held that a promissory note given by a surety for payment on demand without any new consideration was nudum pactum. It is sufficient to say of that case that the note was payable to the plaintiff, and not to order or bearer, and was not therefore a negotiable security. *De la Chaumette v. Bank of England* (5) appears at first sight to be more in point, but there, although it appeared as between the plaintiff and O., by whom the bank note in question was remitted, that the state of account was in favour of the plaintiff, it is not really so, for the note had not been remitted in payment, but merely for collection

(1) 2 E. & B. 89; 22 L. J. (Q.B.) 313.

(2) 3 B & S. 34; 31 L. J. (Q.B.) 304.

(3) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.

(4) 11 C. B. 172; 20 L. J. (C.P.) 186.

(5) 9 B. & C. 208.

as agent, and the Court held that under these circumstances the plaintiff had no better title than O. For these reasons we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the Court below ought to be affirmed.

My Brother Quain, who concurs in the judgment, desires to add that he does not adopt all the reasoning as to consideration.

LORD COLERIDGE, C.J. In this case I am unable to assent to the conclusion at which the other members of the Court have arrived. I am painfully conscious of the great weight of authority against me, but as at last I remain unconvinced, it is my duty to say so, and also shortly to say why.

I need not repeat, because I entirely assent, and cannot add to the statement of the facts of the case, with which the judgment prepared by my Brother Lush sets out.

I proceed to consider the law, assuming the perfect correctness of the facts as stated by him, and being of opinion that on those facts the fifth plea is made out, and that the defendant is entitled to our judgment.

It is important to state what I understand to be the exact proposition contended for by the defendant, and, as I think, contended for rightly. It is this:—If the drawer of a cheque pay it into a banker to the account of a third person, and the consideration as between the person to the credit of whose account the cheque has been paid and the drawer of the cheque wholly fails, so that as between those two parties the drawer would have a perfect answer to any action on the cheque, then the drawer may stop payment of, and has an answer to any action on, the cheque, as against the bankers who have received it, unless in the meantime they have in some way given some value for it; as by paying money, or giving credit or some other advantage, to the customer to whose account it has been paid in, or by altering their own position in some way in consequence of having received the cheque and on the faith of its being paid.

Now, it is too late to dispute that a pre-existing debt due to the

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transferee of a bill entitles him to all the rights of a holder for value. But it seems equally clear that this is an exception to general rules, an extraordinary protection given to such a holder on grounds of commercial policy only, and in order to favour the unrestricted use as currency of negotiable instruments. "It is," says Chancellor Kent, in the well-known case of *Bay v. Coddington* (1), "the credit given to the paper, and the consideration bonâ fide paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." Mr. Justice Willes uses language very much the same in *Whistler v. Forster*. (2) "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the law merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder." It would be wasting time to quote other authorities to the same effect: these are sufficient to shew the grounds of sense and substance on which the law as to bills is supported. Nor, if it be necessary to have recourse to it, is the technical element of consideration wanting between the transferor and the transferee of such an instrument. Whether the true view be that adopted by Sir John Byles (Byles on Bills, 10th ed., p. 39), that a bill or note payable at a future day suspends until its maturity the remedy for the antecedent debt; or that adopted by my Brother Lush, from the judgment of the Court of Common Pleas in *Belshaw v. Bush* (3), that it is a conditional payment of the debt, the debt reviving if the security is not realised; in either view there is consideration which may enter into but is not the whole reason for the protection given to the bonâ fide holder of such an instrument. The whole

(1) 5 Joh. Ch. Ca. 54. (2) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.

(3) 11 C. B. 191; 22 L. J. (C.P.) 24.

reason certainly does not apply to the case of a cheque, and the true question, with deference, appears to me to be whether, apart from the reasons which protect the bonâ fide holder of bills payable at a future day, which do not apply, there are any reasons or authorities which do apply to protect the bonâ fide holders of cheques given under such circumstances as the cheque was given in this case.

As to authority, no case has been cited in which this point has been decided, yet it is certain that a case would have been cited if it could be found. There is, indeed, a dictum of the Lord Chief Justice of the Queen's Bench, in *Watson v. Russell* (1), to the effect that there is no difference between a bill and a cheque in the hands of a holder for value. But that dictum must be taken with the facts of that case, in which neither was the plaintiff a banker, nor was the consideration for the cheque an antecedent debt. No authority, as I have said, has been cited on which the point has been decided. Yet it surely needs one. The doctrine as to bills of exchange has been established after many disputes and much resistance; is it likely that in the case of cheques no one who has been defrauded has ever resisted payment until now, but that everyone has so felt the sense and reason of the rule contended for, that it has been acquiesced in without a struggle? I think not, and I cannot find, on the best information I have been able to get, that the general understanding is what my Brother Lush believes it to be. On the contrary, my impression is that the opinions of men of business are much divided on this subject, and that if the Court were to decide, as I think it ought, in favour of the defendant, the consequences to mercantile transactions would be by no means so serious as it has been too much taken for granted they would be. And even if the matter of fact were clearer than it is, the understanding of mercantile men, though on such a subject entitled to deference, cannot and ought not to determine the question. Apart, then, from authority, which is wanting, how stands the thing in sense? I take a case of gross and direct fraud, for to such a case the argument, if it is good for anything, must extend. A man is cheated

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(1) 3 B. & S. 34; 31 L. J. (Q.B.) 304.

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out of a cheque for a large sum in favour of A.; A., who has cheated him, pays the cheque into his bankers, between whom and himself there have been large dealings greatly to the bankers' advantage. At the moment when the cheque is paid in, A. is overdrawn, and thereupon, nothing more happening, the banker claims the value of the cheque against the cheated drawer, and denies the drawer's right to protect himself against the fraud of A. by stopping his cheque, simply and solely on the ground that the fraudulent man has been allowed by the banker to overdraw his account. I can see no reason or justice in this. If either the drawer or the banker must suffer to the extent of the value of the cheque, it seems to me much more reasonable and just that he should suffer who, with his eyes open, and to a person he knows, has gone on making advances, than he who has been directly defrauded, often in a first and single transaction, and also has often no means whatever of protecting himself against fraud. To me the rule seems hard in the case of money, but it is well settled. It seems hard in the case of bills due at a future date, which are said to be like money, and to stand upon the same foot; but that is also well settled. But cheques are not money; no rule, as far as I can find, either of practice or of law, is settled with regard to them, and I am not willing to make a rule as to cheques in favour of bankers which is not just in itself, and which is not defensible, at least upon the grounds on which the rules as to money and as to bills are defended.

It is said that the distinction between a bill and a cheque is a refined one, but it is to be observed, first, that where a line is drawn, cases close to this line, but on different sides of it, must needs be separated by a distinction which is refined; and next, that we are here dealing with an exception to a general rule, and the burden of proof and stress of argument seem to me to lie rather on those who say, than on those who deny, that it is within the exception. It is for those who assert it to make it out, and the absence of direct affirmative authority in such a case is, to my mind, strong authority in the negative.

It has, however, been argued that the legal element of consideration is not entirely absent where a cheque is given, because

it is payable immediately ; and my Brother Lush has put together, from Comyns's Digest, Action on the Case, Assumpsit, B. 1-15, a definition or description of consideration, to the accuracy of which I entirely assent. It is sought to draw from this definition the conclusion that the practice, by no means uniform or binding, of allowing twenty-four hours to elapse between the drawing or receipt and presentment of a cheque constitutes a new consideration as between the drawer and the payee. I cannot assent to this view. It assumes the substantial identity of a cheque with other instruments from which it differs. "A cheque," says Mr. Justice Story, Promissory Notes, 6th ed. p. 674, "is an absolute appropriation of so much money in the hands of a banker to the holder of the cheque, and there it ought to remain until called for. In truth," he goes on, "a cheque is an instrument sui generis, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of the banker as banker, and it appropriates the amount to the holder of the cheque." To the same effect is the judgment of Sir John Byles in *Keene v. Beard* (1): "A cheque is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person ;" and in commenting on *De la Chaumette v. Bank of England* (2), the same learned person draws the very distinction which is insisted upon here in the defendant's favour. "It would seem to follow," says he (Byles on Bills, 10th ed. p. 39), "as a general rule, that whenever a bill or note payable on demand is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it: a doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance), would no doubt tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors ; but it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value." And in a note to this passage he

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(1) 8 C. B. (N.S.) at p. 381 ; 29 L. J. (C.P.) 287.

(2) 9 B. &amp; C. 208.



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observes: "It is to be recollected that a *bill* or note payable at a future day suspends till its maturity the remedy for the antecedent debt. There may, therefore, in this respect be a difference between an instrument payable on demand and one payable at a future day."

There is, therefore, nothing to bind a banker not to present a cheque paid in till the next day. In practice, I believe it happens constantly that they are presented at once. Although, therefore, there may be an expectation of forbearance for twenty-four hours upon the giving of the cheque, the giving of it is no consideration to forbear, and it is fallacious to confuse things in their nature different.

There are not, as we have seen, any cases directly upon cheques, but there are some upon the subject of bank notes, to which it may be proper to advert. In *Solomons v. Bank of England*, which is reported in a note to *Loundes v. Anderson* (1), the plaintiffs were London merchants in advance to foreign correspondents. A note had been fraudulently obtained, and had been stopped at the bank by the person defrauded. The plaintiffs were innocent of the fraud, and had received the note to be applied in diminution of an existing debt. There was evidence to connect the foreign correspondents with the fraud; and Lord Kenyon held, at nisi prius, and the King's Bench afterwards supported the ruling, that the London merchants had given no consideration; that they were, therefore, mere agents to receive the amount of the note from the bank; that they could be in no better position than their principals; and, as Mr. Justice Buller expressed it in banco, "they must stand or fall by the title of their foreign correspondents." This case was decided in 1791, and it came under the consideration of the King's Bench in 1829, in the case of *De la Chaumette v. Bank of England*. (2) In that case two bank notes had been fraudulently obtained, and were remitted from abroad to the plaintiff, an English merchant, who was, at the time he received them, largely in advance to the foreign remitter. It was held by Lord Tenterden and the Court of King's Bench, that the plaintiff could only recover on the title of the foreign sender. "It appeared," says Lord Tenterden, giving the judgment of the Court,

(1) 13 East, 135.

(2) 9 B. & C. 208.

“that at the time when the note was remitted to the plaintiff the balance as between him and Odier & Co., the foreign senders, was 7000*l.* in favour of the plaintiff; but he did not, in consequence of having received the note, make any further advance or give any further credit to Odier & Co., than he would have done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co., and that, if he can recover at all, it must be upon their right.” A Bank of England note is not a cheque, no doubt, but neither is a cheque an unmatured bill. To hold that the plaintiffs cannot recover in this case, except on Lizardi’s title, and that they were his agents to receive the defendant’s cheque, is not in conflict with any of the cases which have been decided on bills of exchange, while it is, I think, in accordance with the principles of the two cases I have last mentioned, as well as with real justice.

I am not aware that these cases at all interfered with the negotiability of bank notes; and I do not think that the negotiability of cheques will be injured if this case were decided as I should wish to decide it.

There remains the smaller question whether the special circumstance that a so-called “bill” was given up on receipt of the cheque formed of itself a sufficient consideration to entitle the plaintiffs to recover? I need say no more than that I think it did not. The so-called bill was not a bill, it was a mere memorandum and inchoate, and its relinquishment was the giving up of nothing which can be called a consideration. For these reasons I am of opinion that the judgment of the Court below should be reversed.

*Judgment affirmed.*

Attorneys for plaintiffs: *Murray, Hutchins, & Co.*

Attorneys for defendant: *Dawes & Son.*

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## CASES

DETERMINED BY THE

## COURT OF EXCHEQUER,

AND BY THE

## COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXVIII VICTORIA.

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LORD ZOUCHE *v.* DALBIAC.April 26.*Heriot Custom—Statute of Limitations—3 & 4 Wm. 4, c. 27, ss. 1, 2, 3, 34, 42.*

To an action of trespass for seizing and taking a horse, the defendant pleaded an immemorial custom for the lord of the manor, upon the death of a free tenant, to seize the best beast of which the tenant died possessed, wherever it could be found, and that, in 1873, on the death of a tenant, the defendant, as lord of the manor, took the horse under this custom. Replication, that more than twenty years before the heriot in question became due, a heriot became due, for which the then lord of the manor, through whom the defendant claims, did not seize, though he could have done so; that the then lord, whilst entitled, discontinued the taking of heriots; that no heriot had since been taken until the trespass complained of; that the right to make an entry or distress or bring an action to recover heriots, at the time of such discontinuance then first accrued to the then lord within 3 & 4 Wm. 4, c. 27; and that such right so first accrued more than twenty years before the death of the tenant or the trespass complained of. On demurrer:—

*Held*, that the replication was bad, since the seizure by the defendant was not making an entry or distress, nor bringing an action to recover rent within the meaning of 3 & 4 Wm. 4, c. 27, ss. 2, 3, and 34, and that the defendant's title to heriots therefore was not barred by the lapse of twenty years.

*Quære*, whether, notwithstanding the interpretation of "rent" in s. 1, heriot service and heriot custom, or either of them, are within the enactments of ss. 2, 3, 34, and 42.

THE plaintiff declared in trespass for seizing and driving away

two horses belonging to the plaintiff, and converting them to the defendant's use.

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Plea, that the defendant was seised of the manor or lordship of Thakeham, in Sussex, in fee, and that Baron Zouche, now deceased, before and at his death was a free tenant of the manor, and seised of two freehold tenements within the manor in fee, and held the tenements of the defendant, the lord of the manor, by certain rents and services parcel of the manor; that within the manor there was, and from time whereof, &c., had been, an ancient custom for the lord of the manor for the time being to have and take, of right, upon and after the death of every free tenant dying solely seised of any freehold tenement holden of the lord of the manor, the best beast or beasts which were the property of such tenant at the time of his death, one such beast being had and taken in respect of every such tenement, as a heriot; that the lord of the manor for the time being, during all the time whereof, &c., had been accustomed to seize the best beast or beasts of every such free tenant at the time of his death, for such heriot or heriots, for such tenement or tenements, where-soever such beast or beasts had been or could be found; that on the 2nd of August, 1873, the said Baron Zouche, being so seised of the tenements as aforesaid, died seised of such his estate therein, and at the time of his decease was possessed of the horses in the declaration mentioned as of his own proper horses, which horses were his two best beasts, wherefore, afterwards, to wit, on the 24th of October, 1873, the defendant, as lord of the manor for the time being, seized and took the horses, and carried away and detained them as two heriots, one in respect of each of the two tenements, as he lawfully might.

Replication, that more than twenty years before the death of the said Baron Zouche, the lord of the manor for the time being, through and under whom the defendant claims his estate and interest in the same, being then, in respect of the same estate and interest therein claimed by the defendant, in receipt of the rents, heriots, and profits thereof, while so entitled thereto, discontinued the taking and receipt of heriots in respect of each of the tenements, and that no heriot had since been seized, taken, or received in respect of either of the tenements until the seizure and



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taking of the horses in the plea mentioned; that the right to make an entry or distress or bring an action to recover heriots in respect of each of the tenements then at the time of such discontinuance first accrued to the lord of the manor, through whom the defendant claims, within the meaning of the Act 3 & 4 Wm. 4, c. 27, and that such right so first accrued more than twenty years next before the death of the said Baron Zouche, and before the seizure or taking of the said supposed heriots or either of them respectively.

Demurrer to the replication and joinder.

*Manisty, Q.C.* (*C. Elton* with him), for the defendant. Sections 2, 3, and 34 of 3 & 4 Wm. 4, c. 27, on which the plaintiff must rely, do not apply at all to heriot custom. But, assuming that they do, the replication is ambiguous and misleading, being drawn so as to meet the requirements of s. 3, yet without stating any facts from which the Court can judge whether the "discontinuance" is such a discontinuance as is meant by the statute, or whether the lord ever had an opportunity of seizing heriots within the time mentioned, or how and when any right accrued and was exercised or abandoned.

[After some discussion the counsel agreed upon the following written statement: "For the purpose of the demurrer it is to be taken as an admitted fact that more than twenty years before the heriots in question became due, a heriot in respect of each of the two tenements became due, for which the lord did not seize, although he could have done so." The Court then called on—]

*J. Brown, Q.C.* (*J. Digby* with him), for the plaintiff. The question is whether heriot custom is within the scope of 3 & 4 Wm. 4, c. 27, ss. 2, 3, and 34. If it is, the replication is good, and the defendant's title to heriots is extinguished for ever; for it is now admitted that more than twenty years before 1873, when the trespass sued on was committed, a death occurred, upon which the right to take a heriot accrued to the then lord of the manor, and was not exercised. Suppose this was in 1850, the twenty years begin to run from that time. If a death occurs, and the right again accrues before the twenty years have run out, say in 1865, the lord may exercise the right and save the extinguishment of the

title, but if the twenty years elapse without a death happening, the title is barred for ever. In *Owen v. De Beauvoir* (1) the defendant was entitled to an ancient quit-rent, payable annually at Michaelmas out of certain land held of his manor. All the rent which accrued due up to Michaelmas, 1824, was duly paid, the last payment having been made on the 15th of January, 1825. No rent was paid after that date, and on the 15th of May, 1845, the defendant distrained for six years' arrears of rent accrued due up to Michaelmas, 1844. The Court held that the twenty years began to run from the 15th of January, 1825, and that the title to the rent was extinguished by ss. 2, 3, and 34. It is true the Court seemed to think that heriots might not be within those sections, but this dictum was not confirmed by the court of error (2) when affirming the decision of the Court below. The object of the statute being to limit title to land, rent, and other subjects of property, it was not likely that heriots would be excluded. Scriven on Copyhold, 4th ed. p. 369, speaking of heriots, says: "The service is a badge of the feudal system, and may at the present day be deemed the most, if not the only obnoxious part of copyhold tenure." And in *Croome v. Guise* (3) the Court said: "Upon general principles the custom of heriots is not a custom to be extended in favour of the lord." So 1 Cruise, Dig. tit. 10 Copyhold, ch. 4, s. 63, says: "The Court of Chancery will not interpose in favour of the lord in the case of heriots, because the custom is unreasonable, the loss a family sustains being thereby aggravated"—citing *Wirty v. Pemberton*. (4) Then we have the positive words of s. 1: "The word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made." This must be read with a comma after "heriots," so that the words "for which a distress may be made," may apply only to "services and suits," and not to "heriots," otherwise we should be driven to the absurd anomaly of holding that the statute intended "rent" to include heriot service, but not heriot custom; for the remedy for heriot service is by distress, but heriot custom is said to lie in prender only, and not in render, therefore "the lord cannot distrain for it, except as it should seem by special custom:" 1 Scriven, Cop. 375, citing authorities. The same author, at p. 388, says: "Heriot

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(1) 16 M. &amp; W. 547.

(2) 5 Ex. 166; 19 L. J. (N.S.) (Ex.) 177.

(3) 4 Bing. N. C. 148, 160.

(4) 2 Ab. Eq. Ca. 279.

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custom may be seized by the bailiff or other officer of the manor for the lord's use, wherever it may happen to be found, whether upon or in any place out of the manor; and if it be eloigned, the lord may have trover or detinue for it, for the law adjudgeth possession in him without seizure." Therefore the language of 3 & 4 Wm. 4, c. 27, "an action to recover rent," will apply to the remedy for heriot custom. *Chichester v. Hall* (1) does not touch the present case, for there the lord was tenant for life.

*Manisty, Q.C.*, was not heard in reply.

KELLY, C.B. This is an action of trespass for seizing and taking two horses, and the defendant pleads a justification on the ground that he had the right to seize the horses as heriots, one in respect of each of two tenements held by the plaintiff as tenant to the defendant, the lord of the manor within which the tenements are. The question for us is, whether that right is destroyed by 3 & 4 Wm. 4, c. 27. By the interpretation clause, s. 1, it is enacted, that "the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except," &c. The earlier part of this clause says "that the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows;" and this exception is important, since it is the definition of "rent" in this section, which is said to have the effect of taking away the defendant's right to the heriots.

By s. 2, it is enacted, "that after 31st December, 1833, no person shall make an entry, or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims." Now if we look to the literal meaning of the words, it would be enough to say that the act complained of in this declaration was neither an "entry" nor a "distress," nor "an action to recover any land or rent," but a seizure of two horses.

The same remark occurs on reading s. 3: "In the construction

of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned ; that is to say, when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Unless there be some authority for the proposition, I can see no reason for applying the words "make an entry or distress, or bring an action to recover any land or rent" to something which is neither the one nor the other.

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A similar observation applies to s. 34, which enacts "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

When, therefore, we look at the literal words of these sections, it is enough to say that but for s. 1, the present case would clearly not be within the statute. The Court of Exchequer seems to have been of this opinion, as appears from their judgment in *Owen v. De Beauvoir* (1), delivered by Parke, B. No authority or dictum has been cited that heriots are within these sections, though one would have expected the case to arise more than once since 1833, the date of the statute. In considering the spirit of the statute, we must remember the essential difference between the nature of rent and of a heriot. "Rent" is a noun of multitude, meaning not one single sum due at some one moment, which may be recovered by action, and may be lost if not, but meaning a succession of sums of money payable in general yearly or at shorter intervals during the whole term specified. A heriot is a right to take a specific chattel, a right arising either upon death or alienation, in a manor. It is not of a continuous nature. To

(1) 16 M. & W. 547, 566.



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apply to such a subject words in the statute which are applicable only to continuous payments would be to disregard the principle and spirit of the statute; and to apply such words to a case in which no opportunity may occur of enforcing the right for perhaps twenty, thirty, or forty years, would seem to be a total departure from the intention of the legislature.

In the judgment of this Court, delivered by Parke, B., in *Owen v. De Beauvoir* (2), the following passage occurs:—"Another difficulty was pointed out, and much insisted on at the Bar, namely, that on the construction which we adopt great injustice would necessarily result in the ordinary case of heriots and other similar rights, which become due at uncertain intervals; and also the possible, though not very probable, case of a rent reserved payable every twenty years or at a longer interval. In such cases, if the twenty years are to be calculated from the last payment, a party, it was argued, will lose his right without any default or laches whatever when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years; and no doubt great difficulty may exist in dealing with such cases." Now the present case is much stronger than the case of rent payable every twenty years, because the intervals between the times when the right to take a heriot occurs may be much more than twenty years. The judgment proceeds: "But as to heriots, probably the answer to this objection may be that in a case similar to that now before us the word 'rent' would not include heriots—for though by the interpretation clause the word 'rent' is made to include heriots, yet that is only where the nature of the provision or the context does not exclude such a construction; and it may be that the injustice pointed out would afford ground for holding that in the clause now under consideration the word 'rent' does not include heriots. A similar observation may be made upon the case of rents payable at greater intervals than twenty years, and this may be considered either as falling under the general enactment in s. 2, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the statute at all and is left in the same condition as if the Act had not passed." It is unnecessary for our present judgment to go so far as to say that no case could

arise in which "rent" in the statute would include heriots. Bearing in mind the qualification imposed in s. 1 upon the meaning of rent—"except where the nature of the provision or the context of the Act shall exclude such construction"—it is enough to say that upon the facts before us the nature of the provision excludes the application of these sections to the taking of the heriots in question. This view receives confirmation from s. 3, the effect of which, according to *Owen v. De Beauvoir* (1), is, that the time when the right to bring an action to recover rent shall be deemed to have accrued, shall be the last time at which any rent was received. If, therefore, "rent" in that section includes heriots, the twenty years begin to run, not from the time when the heriots became due and the lord failed to enforce the right, but from the time when the last heriot was taken, so that if the last heriot was taken in 1850 and no death occurred till 1873, the lord's title would be barred under s. 34, though he had had no opportunity of exercising his right.

The view we take is fortified by the consideration of s. 42, which enacts that, "after the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." Now if "rent" does anywhere in the statute include heriots, it may be in s. 42, so that the meaning may be that the heriots, the right to which accrued in 1873, cannot be recovered after six years from the time when they became due. However that may be, which it is not necessary to determine now, it is clear that the defendant was justified in taking these heriots, and that the replication is bad.

BRAMWELL, B. I am of the same opinion. I cannot say that there was not some general intention present to the minds of those

(1) 16 M. & W. 547, 566.

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who were parties to this legislation that heriots should be within the provisions of the statute. The principal enactment of the statute is contained in s. 2, the remaining sections up to s. 29 inclusive being explanatory of s. 2. Then come ss. 30—41, dealing with particular subjects, and then comes s. 42. Now, it is strange, if the framer of the statute intended heriots to be within s. 42 only, and not within ss. 2, 3, and 34, that he should say, as he does in s. 1, that “the word ‘rent’ shall extend to all heriots.” I should have thought that he would not have mentioned heriots at all till he came to s. 42; and there is some difficulty in saying that s. 42 applies to heriots, because “arrears of rent” and arrears of heriots are very different things. I therefore doubt—but I give no opinion on the point—whether it was the general intention of the framer of the statute to bar not merely the right to a particular heriot, but the title generally. Though it is very likely that the framer had some general intention with regard to heriots, yet if he had, he has not used apt provisions for carrying out the intention. And he would see it was unjust to comprise heriots in the general words of ss. 2, 3. If he had intended to bar the title, he ought to have enacted as he has done in the case of advowsons, in ss. 30–34. It is not enough that a patron should omit to present to a benefice once, there must be three omissions in succession, or a lapse of sixty years, before a patron is to lose his right. If, therefore, it had been intended to bar the title to heriots, one would have expected that, instead of making it depend on whether a heriot was taken on one occasion—which might make it depend on whether there happened to be an animal worth seizing or whether some wrongdoer, who was not worth suing, removed it—the legislature would have made it depend on whether a certain number of omissions to seize had occurred, or whether some such period as sixty years had elapsed, as in the case of advowsons. Though, therefore, it is likely that there was some general intention of making the title to heriots barrable, yet as there are no particular words applicable to seizing heriots, I do not think such a case as the present can have been in the mind of the legislature, and happily there are no general words which comprehend the right to seize heriots.

The question for us turns on s. 2: “No person shall make an

entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims." If we are to read "rent" there as including heriots (I think we ought not, but supposing we ought) the effect will be that wherever in order to recover a heriot it is necessary to bring an action, the section applies and the right is barred. But the section does not say that no person entitled to seize heriots shall seize heriots but within twenty years next after the time at which the right to seize shall have first accrued, and there is, therefore, no prohibition against doing what the defendant has done here and what he might have done before the passing of the statute. It would be monstrous if, owing to the accident that no tenant dies and no occasion for taking a heriot arises for more than twenty years, the right should be for ever extinguished. I think if the legislature had intended to deal with such a case they would have provided as they did in the case of advowsons.

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There is another consideration derived from s. 42. If the words in that section, "no arrears of rent . . . shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due," include arrears of heriots; and if the lord lets six years go by after a heriot becomes due without enforcing his right, he cannot recover that particular heriot; and if the right does not occur again within the next fourteen years, then, supposing the plaintiff's construction of the statute to be correct, the right is gone for ever. For let the lord do what he may—unless he kills the tenant—he cannot during those fourteen years prevent his title being barred. Such an effect cannot have been intended, and there is great additional weight derived from the opinion of this Court in *Owen v. De Beauvoir*. (1)

The conclusion, therefore, to which I come is, that whatever the general intention of the legislature may have been, they did not intend to touch this particular case; or that if they did they have not expressed their intention in words, for there is nothing in s. 2 to prevent the defendant doing what he has done, and what before the statute he had a right to do.

(1) 16 M. &amp; W. 547, 566.



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POLLOCK, B. I am of the same opinion. For the reasons given by my Brother Bramwell, I think heriots are not within the spirit of ss. 2 & 3. What the defendant did was neither "making an entry on land" nor "making a distress." Nor was it an action to recover a heriot. The character of heriots is well illustrated in Viner's Abr. tit. Heriot (E): "Prescription to distrain for heriot custom if it be eloign'd is not good; for he may have an action against whomsoever eloign'd it; and by this it seems that he may have an action of detinue against him who detains it; for he has a property in the thing, and therefore, because it is transitory, the law adjudges *possession without seisin* as of the body of a Ward. Br. Heriots, pl. 9."

AMPHLETT, B. I am of the same opinion. I think our judgment can be justified consistently with both the letter and the spirit of the statute. I agree with Mr. Brown that the words in the interpretation clause "the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made," must be read with a pause after "heriots," and that the words "for which a distress may be made" do not extend to "heriots." The clause, therefore, will be read as if it were "all heriots, whether customary or otherwise;" but subject to this qualification, "except where the nature of the provision or the context of the Act shall exclude such construction." Now, "rent" is used in two different senses in this statute. Its meaning in s. 2 was decided in *Grant v. Ellis*. (1) In the judgment of the Court, delivered by Rolfe, B., it is said: "The defendant contends that the word "rent" in s. 2 of the statute cannot be taken as having any reference to rents such as that now in question, viz., rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation, but must be confined to rents existing as an inheritance distinct from the land, and for which, before the statute, the party entitled might have had an assise such as ancient rent service, fee farm rents, or the like. We accede to this latter view of the case." The judgment then proceeds to give the reason for this construction of the word

(1) 9 M. & W. 113, 122.

"rent." Following this view, "rent" in ss. 2, 3 cannot include heriots, for a heriot is certainly not a rent "existing as an inheritance distinct from the land." 1875

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*Judgment for the defendant.*

Attorney for plaintiff: *E. Byrne.*

Attorneys for defendant: *Parkers.*

### THE GUARDIANS OF HALIFAX UNION v. WHEELWRIGHT.

May 8.

*Treasurer to Guardians—Banker and Customer—15 & 16 Vict. c. 59, s. 19—*

*Forged Indorsement—Negligence in drawing Cheques.*

The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the Orders were cashed like cheques payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded 3000*l*.

A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank.

On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature:—

*Held*, first, that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess;

Secondly, that as to the payment on forged indorsements the account at the bank was in effect the plaintiffs' account; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the plaintiffs the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank.

SPECIAL CASE stated by an arbitrator.

The defendant was the treasurer to the plaintiffs, appointed

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under the Poor Law Consolidated Order of the 24th of July, 1847. (1)

The defendant was the salaried manager of the Halifax Commercial Banking Company, Limited, and was appointed treasurer because it was considered desirable by the guardians that the treasurer should be a bank manager. No express remuneration or salary was assigned to him as treasurer, nor did he receive any profit from the use of the money left in his hands. (2)

When the defendant was first appointed treasurer the plaintiffs' accounts were kept in a common pass-book headed "Guardians of Halifax Poor Law Union in account with the Halifax Commercial Banking Company, Limited." The account was afterwards kept in a treasurer's book, according to the form prescribed by the Poor Law Orders (1), but no change was made in the bank ledger.

The sums deposited by the plaintiffs were dealt with by the bank in every respect in the same manner as funds deposited with them

(1) By Arts. 153, 154, the guardians are to appoint a treasurer, who is to perform the duties imposed on him by the orders.

By Art. 203, the duties of the treasurer are (inter alia) "1. To receive all moneys tendered to be paid to the guardians, and to place the same to their credit; 2. To pay out of any moneys for the time being in his hands belonging to the guardians all orders for money which shall be drawn upon him in conformity with Art. 84, when the same shall be presented at the house or usual place of business of the treasurer, and within the usual hours of business; 3. To keep an account, under the proper dates, of all moneys received and paid by him as such treasurer, to balance the same at Lady Day and Michaelmas in every year, and to render an account of such moneys to the guardians when required by them to do so." By Art. 204 the regulations of Art. 203 are not to be applicable to cases in which the Governor and Company of the Bank of England may act as trea-

surer of the union or bankers to the guardians.

By Art. 84, "the guardians shall pay every sum greater than 5*l.* by an order, which shall be drawn upon the treasurer of the union, and shall be signed by the presiding chairman and two other guardians at a meeting, and shall be countersigned by the clerk;" the form of the order is fixed by Art. 1 of the General Order of April, 1857.

By the General Order for Accounts (14th of Jan. 1867), Art. 18, "The treasurer shall keep punctually and accurately a book according to the form set forth in sched. D., hereunto annexed, in which shall be entered an account of all moneys received and paid by him on account of the guardians," which he is to balance quarterly, and lay before the guardians once a month.

(2) By Art. 174 of the Consolidated Order, 1847, "If no remuneration or salary be expressly assigned to the treasurer, the profit arising from the use of money from time to time left in his hands shall be deemed to be the payment of his services."

by other customers. It was understood that when the balance to the credit of the guardians exceeded 3000*l.* interest in respect of it should be allowed by the bank; and during the period when the transactions in question took place the guardians were on several occasions credited with sums of money as interest, which were entered in the treasurer's book as payments to their credit by the bank.

The course of business between the plaintiffs and the defendant was, that sums of money were from time to time paid to the account of the plaintiffs across the counter to the bank clerks, and the orders signed on behalf of the plaintiffs were cashed like cheques payable to order.

The orders were drawn upon the defendant, and were signed and countersigned in conformity with Art. 84 of the Poor Law Orders (1), and were upon forms, the material parts of which were as follows:—"Pay to \_\_\_\_\_, or order, the sum of \_\_\_\_\_ pounds, \_\_\_\_\_ shillings, and \_\_\_\_\_ pence, and charge the same to the account of the said guardians," with a place for the figures in the left-hand corner, as in an ordinary cheque.

Barstow, the clerk to the plaintiffs, had in his employment a clerk named Laidler, whose duty it was to fill up the orders. Laidler drew a large number of orders in such a way, that after they had been duly signed and countersigned, the amounts could be increased; and he did accordingly increase the amounts, sometimes by adding the syllable "teen" after the written number of pounds, and sometimes by inserting the words "twenty," "thirty," &c. before the written number, and by altering in a corresponding way the figures denoting the amounts. Orders so increased, but in all other respects genuine, were presented and paid at the bank in the ordinary way; and it was found as a fact by the arbitrator, that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared by Laidler for their signature.

It did not appear how the indorsements were obtained in these cases, but it was stated as probable that the amounts were increased after the indorsement of the orders.

(1) See ante, p. 184, n. (1).

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In other cases, however, Laidler forged the indorsements to orders not so altered, and obtained payment of them to the amount of 287*l.* 9*s.* 5*d.*

In other cases, again, he both forged the indorsements and also increased the amounts, and obtained payments to the amount of 273*l.* 12*s.* 4*d.*, being 191*l.* in excess of the amount for which the orders were drawn; being enabled in every case to make the fraudulent increase by a want of caution on the part of the guardians as above described.

The guardians brought an action against Barstow for negligence, and in their particulars claimed 3681*l.* 17*s.* 5*d.*, which included all the orders contained in the particulars in the present action; and that action was compromised by an agreement, by which proceedings were to be stayed "on payment to the plaintiffs of the sum of 2320*l.* 4*s.* 6*d.*, the amount of certain of the orders or cheques enumerated in the particulars of the plaintiffs' demand," to be paid by instalments as therein mentioned, "this sum to be accepted in full discharge of all claims, demands, and liabilities in this action, or otherwise against the defendant as clerk to the board;" the plaintiffs engaging to assist Barstow in any proceedings to recover any money from Laidler, or his estate, or in prosecuting him, on being indemnified by Barstow.

In their particulars in the present action the plaintiffs gave credit to the defendant for 1302*l.*, being the amount of thirty-five orders which had been made payable to Barstow, considering that they were morally, though not legally, barred of their claim against the defendant in respect of these orders by their compromise with Barstow; and they claimed against the defendant the balance of 2379*l.* 9*s.* 5*d.* in respect of orders, some of which had been increased, some indorsed, and some both increased and indorsed by Laidler, as above stated.

The questions for the opinion of the Court were:—(1.) Did the settlement with Barstow prevent the plaintiffs from recovering against the defendant in this action? If not (2.) Were the plaintiffs entitled to recover from the defendant any and which of the sums of 287*l.* 9*s.* 5*d.* (the amount of the unaltered cheques with forged indorsements), 273*l.* 12*s.* 4*d.* (the amount of the orders with the amounts increased and the indorsements forged), or

82*l.* 12*s.* 4*d.* (the original amount of the last-mentioned orders), or 191*l.* (the amount of the increase in the same orders)?

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Jan. 20, 21. *Field, Q.C.* (*Gibbons* with him), for the plaintiffs. First, as to the defence to the whole action, the settlement with Barstow is no answer. The duties of Barstow and the defendant were entirely distinct and independent, and there is nothing resembling a joint tort. Therefore the rule laid down in *Brinsmead v. Harrison* (1) has no application. Secondly, as to both the sums of 287*l.* 9*s.* 5*d.* and 273*l.* 12*s.* 4*d.*, paid on forged indorsements, the defendant is not within the protection of 16 & 17 Vict. c. 59, s. 19 (2), which is an enactment in favour of bankers only: *Ogden v. Benas*. (3) The plaintiffs are persons acting under limited statutory powers, and with a statutory duty to appoint a treasurer. Their relation to the defendant is determined by the Poor Law Orders, which shew it to be rather that of master and servant, or principal and agent, than that of banker and customer. The intention of the Orders seems to be that the guardians shall not have a banking account themselves, but that some one person, to be named and appointed by them, shall be personally answerable to them for all moneys received by them or on their account. And, in fact, the plaintiffs had no banking account; they had no pass-book, but their accounts were kept in the treasurer's book as provided by the Orders. (4) The only banking account was the defendant's, and the plaintiffs' orders were not on the bank to pay, but on the defendant at the bank to pay; he might have kept his account at any bank. The mode in which the bank kept the account in their own ledger cannot affect the plaintiffs. Thirdly, assuming that the defendant is protected by 16 & 17 Vict. c. 59, s. 19, yet as to the sum of 191*l.*, the amount by which some of the orders paid on

(1) Law Rep. 7 C. P. 547.

(2) 16 & 17 Vict. c. 59, s. 19: "Any draft or order drawn upon a banker for a sum of money payable to order or demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of such draft or order to the

bearer thereof; and it shall not be incumbent 'on the banker to prove that such indorsement, or any subsequent indorsement, was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorsee thereof."

(3) Law Rep. 9 C. P. 513.

(4) See ante, p. 184, n. (1).

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forged indorsements were increased, the defendant cannot discharge himself. He can only discharge himself by shewing that he has paid moneys by the authority of the plaintiffs. This is clearly laid down in *Scholey v. Ramsbottom* (1) and *Hall v. Fuller*. (2) The defendant relies upon *Young v. Grote* (3), but the grounds of decision in that case are uncertain, and the present case is not within it. Parke, B., in *Robarts v. Tucker* (4), puts it on the ground of the plaintiff having, "by signing a blank cheque, given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted." Blackburn, J., in *Swan v. North British Australasian Co.* (5), puts it on the ground that "a person putting in circulation a bill of exchange, does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it;" and in the same case (6) Cockburn, C.J., treats it as founded on the principle of avoiding circuitry of action. In *Evans' Trustees v. Bank of Ireland* (7) Parke, B., in delivering the opinions of the judges, and Lord Cranworth, put it on the ground of estoppel. In a manuscript note appended to the latter case (8) Pollock, C.B., says: "Whatever doubt may seem to be thrown upon the case of *Young v. Grote* (3) and *Coles v. Bank of England* (9), as to the result in each case, no doubt whatever is thrown upon the principles on which those cases were avowedly decided. This case is an authority for the correctness of those principles, though it professes to doubt the propriety of their application." But, in fact, the difficulty is to know what principle is affirmed by *Young v. Grote*. (3) The most probable ground is estoppel by negligence; but *Evans' Trustees v. Bank of Ireland* (7) and *Swan v. North British Australasian Co.* (5) are authorities that such an estoppel can only arise from some act inducing or inviting fraud; mere want of caution is not enough, for no man is called on to anticipate the commission

(1) 2 Camp. 485.

(2) 5 B. &amp; C. 750.

(3) 4 Bing. 253.

(4) 16 Q. B. 560, at p. 580; 20 L. J. (Q.B.) 270.

(5) 2 H. &amp; C. 175, at p. 183; 32 L. J. (Ex.) 273.

(6) 2 H. &amp; C. at p. 190; 32 L. J.

(Ex.) 273.

(7) 5 H. L. C. 389, at pp. 410, 413.

(8) In the Exchequer copy of 5 H. L. C. at p. 415.

(9) 10 A. &amp; E. 437.

of a fraudulent act so as to be bound by not excluding its possibility. No such act of negligence is established against the plaintiffs here; it is only found that the defendant was misled by their "want of caution," and that finding must be interpreted, and its effect determined, by the facts of the case.

*Wills, Q.C. (Mellor with him)*, for the defendant. First, as to the increased amounts, the case of *Young v. Grote* (1) has never been overruled, although the precise principle on which it was decided has been made matter of question. No doubt is thrown upon it in *Evans' Trustees v. Bank of Ireland* (2), and its authority is expressly recognised in *Ex parte Swan* (3) and in *Orr v. Union Bank of Scotland* (4), where Lord Cranworth says: "The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." To use the language of Lord Cranworth in the same case, the question is, whether the payment is not a payment which the defendant is "entitled to consider as valid between him and the plaintiffs;" and that depends on whether the bank clerks were not induced to pay this money through the plaintiffs' negligence. On this point the case is express, that the payment was due solely to the clerks being misled by the plaintiffs' want of proper caution, which excludes any negligence on their own part, or on the part of the defendant. All the conditions, therefore, required by Blackburn, J., in *Swan v. North British Australasian Co.* (5) are present; the negligence was in the transaction, it was neglect of a duty owing to the defendant, and it was the direct and proximate, and the sole cause of the excessive payment. If, then, the negligence of the plaintiffs has induced the bank to part with money on their account, apparently with their authority, and upon an instrument in which the genuine part was in the same hand with, and undistinguishable from, the fraudulent addition, then, to avoid circuity of action, as was put by Cockburn, C.J., in the last-mentioned case, they cannot recover from the defendant a sum which on these grounds they

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(1) 4 Bing. 253.

(4) 1 Macq. 513, at p. 522.

(2) 5 H. L. C. 389.

(5) 2 H. &amp; C. at p. 182; 32 L. J.

(3) 7 C. B. (N.S.) 400, at p. 445; (Ex.) 273.

30 L. J. (C.P.) 113.



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would be liable to repay. Secondly, as to the forged indorsements, the defendant is protected by 16 & 17 Vict. c. 59, s. 19, which was meant to include all persons acting as bankers. This appears from the earlier Act of 55 Geo. 3, c. 184, the schedule to which exempted from duty "all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker." That Act was repealed by 16 & 17 Vict. c. 59, and the exemption in the schedule is of "all drafts or orders for the payment of money to the bearer on demand, drawn upon any banker or bankers, now by law exempt from stamp duty." The exemption is meant to be as wide as that under 55 Geo. 3, c. 184, although the words "or any person or persons acting as a banker" are omitted; and that this is so is confirmed by the subsequent Act of 17 & 18 Vict. c. 53, s. 7, which, in reciting the exemption, restores the omitted words. It may be concluded, therefore, that the intention was equally extensive in s. 19, and the words are sufficiently general to allow of a construction which will give that intention effect. Further, this account was in effect the plaintiffs' account with the bank, kept at the bank by their direction and on which they, and not the defendant, received in trust. They cannot therefore claim against the defendant what he could not claim against the bank. Thirdly, assuming the defendant to be otherwise liable, the settlement with Barstow is an answer. Without Barstow's negligence the act complained of, that is the unauthorized payment, would not have been done. It is a joint act of negligence, and the principle of *Brinsmead v. Harrison* (1) applies.

*Gibbons*, in reply, referred to *Reg. v. Braintree Union* (2) and *Pott v. Clegg*. (3)

*Cur. adv. vult.*

May 8. The judgment of the Court (Cleasby, Pollock (4), and Amphlett, BB.) was delivered by

CLEASBY, B. In this case, which was argued before my Brothers

(1) Law Rep. 7 C. P. 547.

(2) 1 Q. B. 130.

(3) 16 M. & W. 321.

(4) Pollock, B., doubted as to the

second item, but as the question depended on inference from facts, did not dissent.

Pollock and Amphlett and myself, the question is whether the defendant, who was the treasurer of the plaintiffs, is liable to them for moneys received and not accounted for. The facts appear upon the special case, and it is unnecessary to recapitulate them.

The question arises upon two items; that is, as was agreed by the learned counsel, it is reduced to two items. The two items are: First, 273*l.* 12*s.* 4*d.* (composed of two amounts, 191*l.* and 82*l.* 12*s.* 4*d.*); second, 287*l.* 9*s.* 5*d.*

The question upon the first item is, whether the defendant can claim the credit of payments made by him upon orders which had been signed by the plaintiffs, but had become forgeries by the amounts being increased. Under ordinary circumstances he could not claim the benefit of those payments; but it was said the forgeries were attributable to the negligent and improper manner in which the drafts were drawn. The alleged negligence was by leaving blanks in the drafts which admitted of the insertion of increased amounts by the person who wrote them, and who committed the forgeries. Since they were signed by or on behalf of the plaintiffs in the improper form in which they had been drawn, the case is the same as if they had been drawn in their improper form, and the plaintiffs cannot, we think, avail themselves of the fact that the drafts were not drawn by themselves, but by some person in the office of their clerk.

We have upon the consequences of the negligent drawing of the plaintiffs the following statement: "The orders thus fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way, and I find that the payment by the treasurer's clerks of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk, in signing the orders fraudulently prepared by Laidler for their signature." The question, therefore, which arises upon this item is, whether the negligent drawing of the drafts disentitles them to complain of the cashing those drafts. Upon this question we had before us the principal case of *Young v. Grote* (1), followed by several other cases, among others *Robarts v. Tucker* (2), and *Swan*

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(1) 4 Bing. 253.

(2) 16 Q. B. 560; 20 L. J. (Q.B.) 270.

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*v. North British Australasian Co.* (1) We think the position taken by the defendant is made good by those authorities. It is true that there is some difference of opinion as to the proper legal ground for the conclusion, and perhaps some difficulty in determining which is the soundest. It is put on the ground of the negligence itself disentitling the party guilty of it in the first cited case, where the fault is said to be all on one side, and where the conclusion is justified in the judgment of Best, C.J., by an apposite quotation from Pothier. In the case of *Robarts v. Tucker* (2), upon error from the Queen's Bench, Baron Parke, in no way impeaching the judgment in *Young v. Grote*, considered that it was founded on this, that the person who negligently drew the cheque "as it were gave authority to the party to fill up the cheque in the way it was filled up."

In the last cited case (*Swan v. North British Australasian Co.* (1)) the present Lord Chief Justice of the Queen's Bench preferred putting the conclusion upon the ground of avoiding circuity of action, which is certainly the most exact ground, and agrees with what is said by Pothier in the passage referred to. But these various reasons for the conclusion only show how incontestable the conclusion itself is; and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular county, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default, against a person who was misled by that default without any fault of his own. So far, therefore, as regards this item of 273*l.* 12*s.* 4*d.*, we think the plaintiffs cannot recover.

As to the other item of 287*l.* 9*s.* 5*d.*, the question raised is one of some difficulty, and we thought proper to take time to consider of it. This item may be taken to be the amount of orders which were paid upon forged indorsements, and the negligent drawing of orders does not apply to it at all.

The question raised is, whether, under the circumstances of the

(1) 2 H. & C. 175; 32 L. J. (Ex.)  
273.

(2) 16 Q. B. 560; 20 L. J. (Q.B.)  
270.

case, the defendant can claim the protection given to bankers by the statute 16 & 17 Vict. c. 59, s. 19. Previous to that statute, if a banker paid a cheque with a forged indorsement upon it he could not charge it against his customer; but the effect of that statute was to enable him to do so.

Two arguments were addressed to us upon this part of the case. First, it was said that, taking that statute together with several other statutes on the same subject, the word "bankers" was not to be restricted to persons regularly engaged in the business of banking, but that any person who receives the money of another into his charge, and, according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a banker within that enactment. We cannot accede to that argument. We think the legislature had reference to a particular class, viz., persons carrying on the business of bankers, and conferred upon them a great privilege. Such a privilege can only be claimed by the clearest language. A confidence might be well placed in the integrity and character of some persons, which would not belong to *any* person entrusted with money.

The other ground taken deserves more consideration. It was contended that all the facts of the case taken together shewed that the account of the guardians ought to be regarded as a banker's account kept by them with the Halifax Bank. The manner in which the orders were drawn, not being drawn upon the bank, but the treasurer, who was manager of the bank, was relied upon, and no doubt with some reason, to shew that there was not a banking account between the guardians and the bank. And if there was no other evidence on this part of the case, it would be conclusive.

But it appears that the course of business was for money to be paid to the credit of the plaintiffs across the counter. It further appears that for some time the plaintiffs' account was kept in a pass-book in the usual manner, and that afterwards it was kept in a treasurer's book in the prescribed form. It seems clear that, until the change, the bankers were the bankers of the plaintiffs; and, though the statement is not so full as it might have been, the change was not for the purpose of altering the relation between

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the plaintiffs and the bank, but to comply with the rules as regards the treasurer. And this conclusion is fully warranted by the statement, from which it appears that unquestionably in point of fact the guardians had for their own benefit an account of some sort with the bank, and the money was by consent of both parties regarded as theirs, and the plaintiffs received considerable sums of money from the bank as interest for their money. It was, therefore, a banker's account.

But it was forcibly argued that, according to the poor-law regulations, this could not be. The guardians are to pay to the treasurer, and the treasurer ought to have had his own account with the bankers. The answer to this seems to be that the guardians chose to make use of a manager as treasurer, and in that way have the benefit of an account with the bank. We must, upon the question before us, deal with the facts as they are, not as they ought to have been.

It follows that the plaintiffs having chosen to keep and have the benefit of a banker's account, must take it with its incidents, and one of those is, that the payment of a genuine cheque with a forged indorsement is a discharge.

It may be said that, though the bankers are discharged as against the plaintiffs, still the treasurer is not discharged, because he has bound himself to account for what he receives. But the proper answer to this seems to be, that there was, in consequence of the manner in which the plaintiffs, who were the masters, chose to have the account kept, no receipt except by the bankers, and the defendant could not help himself; he can only, therefore, be regarded as receiving subject to the consequences of the manner of receiving.

It may also further be said, that if the account must be regarded as the account of the treasurer with the bank, still it was an account kept by him with this bank by the order of the plaintiffs, and they ought not, therefore, to make a claim which he could not have enforced against the bank.

The case is one of difficulty, in consequence of the parties having departed from the proper course; but we think the proper conclusion is, that as the only receipt by the defendant was the receipt by the bankers, under the circumstances stated in the

case, he cannot properly be held liable when they, without any act or default on his part, are discharged.

*Judgment for the defendant.*

Attorneys for plaintiffs: *Le Riche & Son.*

Attorneys for defendant: *Jacobs, North, & Vincent.*

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[IN THE EXCHEQUER CHAMBER.]

May 15.

TYERS AND OTHERS v. THE ROSEDALE AND FERRYHILL IRON  
COMPANY, LIMITED.

*Contract of Sale of Goods—Delivery by Instalments—Monthly Deliveries—  
Forbearance of Vendor at Request of Vendee.*

The defendants in October, 1870, contracted to sell to the plaintiffs 2000 tons of iron "delivery in monthly quantities [of 166 $\frac{2}{3}$  tons] over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2000 tons. The defendants refused it, and denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery.

The majority of the Court of Exchequer (Kelly, C.B., and Pigott, B.) held that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2000 tons in December, and were therefore not entitled to recover; but Martin, B., dissenting, held that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2000 tons under their contract:—

*Held*, by the Exchequer Chamber, reversing the judgment of the Court below, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action.

APPEAL from the decision of the Court of Exchequer, making absolute a rule to enter a verdict for the defendants: Law Rep. 8 Ex. 305.

The pleadings and the material part of the case are set out

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in the report in the Court below. It is unnecessary to give the correspondence, as the facts can be gathered from the head-note, but it may be here mentioned, that when the defendants wrote refusing to deliver the balance of the iron in December, the plaintiffs wrote insisting upon the delivery of the balance of the 2000 tons, and the defendants replied denying that they were liable to deliver any more than what was due on the monthly balance, and that in the action the defendants paid into Court sufficient to cover the deficiency due on the monthly balance. Blackburn, J., who tried the case without a jury, ruled that the effect of the different postponements, at the request of the plaintiffs, by the consent of the defendants, was not to put an end to the contract, but only to postpone the time for the delivery, and consequently there was a breach of contract. He reserved leave to the defendants to move to enter a verdict on the construction of the documents and correspondence. As to the damages, he further ruled that the breach was on the day in December when the defendants definitively refused delivery, and that the damages were to be estimated at that date, the defendants to have leave to move that the damages be estimated at any other period or upon any other principle the Court might lay down, and to reduce the damages or enter the verdict accordingly. A verdict was entered for the plaintiffs in pursuance of this ruling, and a rule nisi was afterwards granted to enter a verdict for the defendants or to reduce the damages on the ground that the quantities undelivered were so undelivered at the request of the plaintiffs, and that the plaintiffs were not ready and willing to take them when they ought to have been, and that the plaintiffs were not entitled to sue in respect of them, that the original contract was abandoned or varied, that no new contract to the effect alleged by the plaintiffs resulted from the evidence, that the damages ought to be calculated at the monthly prices of each month's deficiencies, and that the money paid into Court was enough, and that the postponement (if any) was not to the month of December, and that the breaches should have been taken each month to the 1st of December.

Against this rule, which was made absolute by the Court of Exchequer (Martin, B., dissenting), the plaintiffs appealed.

*Cave*, for the plaintiffs. First, the question whether the parties

did or did not enter into a new contract was one of fact for the judge at the trial.

[*Herschell, Q.C.*, for the defendants, intimated that he should not contend that there was no writing to satisfy the Statute of Frauds.]

The substantial question is, can anything be found in the correspondence to exonerate the defendants from their liability to deliver the whole 2000 tons of iron? It will be observed that they did not ask for a reasonable time to enable them to deliver the balance, but insisted that they were only liable for the December delivery. There are no cases which throw much light upon the effect of the correspondence. *Ogle v. Vane* (1), which was referred to in the Court below, has very little bearing upon the subject. Secondly, with regard to the damages, it is not likely to be disputed that, as there was a rising market, it was a positive advantage to the defendants to have them assessed as though the breach were in December.

*Herschell, Q.C. (Waddy, Q.C., with him)*, for the defendants. No objection is now taken to the period with respect to which the damages were assessed. But as to the defendants' liability to deliver the 2000 tons, it is contended that the judgment of the Court below was right. The plaintiffs are bound to shew that they were ready and willing to receive the iron when it ought to have been delivered.

[BLACKBURN, J. The answer is, "We were ready to receive the iron when you were ready to deliver it, but we requested you not to require us to receive it, and you consented."]

The liability of the plaintiffs to receive must stand or fall with the liability of the defendants to deliver. The parties intended that upon each occasion when an instalment was not received the defendants should not be bound henceforward to deliver it. It is most unreasonable to suppose that it was meant that the whole balance of the iron should be called for at the end of the year. [He cited *Brown v. Muller*. (2)]

*Cave* was not heard in reply.

COCKBURN, C.J. I am of opinion that the judgment of the Court of Exchequer must be reversed. I think that the true view

(1) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.

(2) Law Rep. 7 Ex. 319.



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of the case was taken by the dissenting judge, Baron Martin. There was a contract to purchase 2000 tons of iron to be delivered in monthly instalments. It did not suit the purchasers to take the iron in the instalments originally contemplated by the parties, and they proposed to the sellers to postpone from time to time the delivery of the monthly instalments. Now it would have been perfectly competent to the defendants to say, "We will not acquiesce in that proposal of yours. You are bound to take the iron month by month, and you must so take it, or consider the contract at an end." Instead of doing that the defendants, as I read the letters, acquiesced, not in holding the contract at an end, but in postponing the period of delivery. The iron was to be delivered in the course of the year 1871, and there was, by reason of this postponement, a very considerable arrear at the end of this year. Then the plaintiffs call on the defendants to deliver at once the whole of what remained undelivered. I think that this was a demand which they were not entitled to make. I think that the postponement had the effect of carrying the period of delivery over the year 1872, but that the defendants could not be called upon to deliver 1000 tons of iron at one time, but only in such quantities as was originally provided for. Therefore the defendants might have said, "We shall not deliver the whole that remains in one mass, but we will deliver it according to the terms of the contract." But they did not say this. What they said was, "We will not deliver you anything at all." There I think they were wrong. Consequently, there was a breach of the contract, for which the defendants are liable in damages.

The question of the damages might have been a matter of nice calculation, as to what was the damage in respect of each monthly instalment of the period which still remained for delivery. But, fortunately, that question does not arise here, for the assessment of damages at the December market-price is advantageous to the defendants, and not to the plaintiffs. I think the true effect of the correspondence is that there was merely a postponement of the period of delivery of the instalments, the contract still remaining open, and both parties being bound by it. I think, therefore, that the judgment of the Court below should be reversed.

BLACKBURN, J. I am of the same opinion. It is hardly nece

sary for me to say more than that I entirely agree with the judgment of Baron Martin in the Court below, but I wish to draw attention to two points which need not be decided here. The first is this, whether, when the postponement of deliveries took place at the plaintiffs' request, the effect was to make the balance of the iron deliverable during the rest of the year 1871 by monthly instalments, or whether the plaintiffs had a right to require to have it all delivered in December. I do not think it necessary to decide this point, for in December the defendants in effect said, "We will deliver a certain quantity, and no more at any time." Had they said, "We want a reasonable time, and no more," I should have been willing to construe the agreement in that way. But they did not ask for time; they refused to deliver anything but the monthly quantity.

Then comes the other question, what, when there was a complete breach of the contract in December, was the measure of damages? Is it what would enable the plaintiffs to go into the market and purchase the iron at the then market-price, or ought the damages to be computed by the different monthly prices which prevailed afterwards, ascertained as a matter of fact, or ought the calculation to be made before the trial? This, again, is a question upon which I do not wish to express an opinion, as it does not arise here, inasmuch as it appears that the amount ascertained by taking the price in December was more favourable to the defendants than if it had been taken afterwards.

MELLOR and LUSH, JJ., concurred.

BRETT, J. I agree with the judgment of the Lord Chief Justice, but I desire to reserve my opinion as to the measure of damages, and as to whether, for that is really what it comes to, the case of *Roper v. Johnson* (1) decides the point.

LINDLEY, J., concurred.

*Judgment reversed.*

Attorneys for plaintiffs: *Torr & Co., for Middleton & Sons, Leeds.*

Attorney for defendants: *J. Scott, for Hodge & Harle, Newcastle-upon-Tyne.*

(1) Law Rep. 8 C. P. 167.

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TYERS

v.

ROSDALE AND  
FERRYHILL  
IRON CO.

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REES v. WILLIAMS.

April 27.

*Attorney and Solicitor—Remuneration in Lieu of Costs—Action for Breach of Agreement—Attorneys and Solicitors Act, 33 & 34 Vict. c. 28, ss. 4, 7, 8, 9.*

The declaration alleged that by an agreement in writing between the plaintiff, who was an attorney, and the defendant, it was agreed (*inter alia*) that the defendant should be prepared to sell certain gas works, and that the plaintiff should be employed to carry out the sale, and be paid a commission of 4*l.* per cent. on the purchase money in lieu of costs. Breach, that the defendant would not permit the plaintiff to carry out the sale, and had refused to pay any commission. Plea, that the agreement was for services to be done by the plaintiff as the defendant's attorney and solicitor within the meaning of the *Attorneys and Solicitors Act, 1870*, of which s. 8 enacts that "no action shall be brought upon any such agreement":—

*Held*, on demurrer, that the plea was bad, and the action maintainable, for s. 8 was intended to prevent actions to recover the remuneration agreed upon in lieu of costs when the work had been done, and did not apply to an action for refusing to allow the attorney to do the work and earn the remuneration.

THE declaration alleged that the plaintiff was an attorney and solicitor practising at Cowbridge, in the county of Glamorgan, and the defendant was the owner of a large number of shares in the Briton Ferry Gas Works Company, and was also lessee of the Briton Ferry Gas Works from the company; and the defendant, being unable otherwise to carry on the works, was desirous of obtaining moneys, to be lent to him for the purpose of enabling him to carry on the works, and also to enable him to purchase other shares in the company; and requested the plaintiff to procure moneys to be lent to him as aforesaid, and thereupon on the 2nd of October, 1872, an agreement was made between the plaintiff and the defendant, in the words and figures following:—

"Briton Ferry, 2nd October, 1872. To Mr. Thomas Rees, solicitor, Cowbridge. I hereby agree to pay you a commission of 5*l.* per cent. for all money you will obtain for me to purchase shares in the Briton Ferry Gas Works, in lieu of your costs. Also I hereby agree to be prepared within six months from the 1st March next to sell the said Briton Ferry Gas Works, and for the consideration aforesaid I hereby agree that you shall have the carrying out of the sale, and I agree to pay you a commission of 4*l.* per cent. on the purchase money in lieu of your costs; and if there shall be

any other shareholder who may object to your being paid this commission, I agree to pay you the same out of my own share of the purchase money. As witness my hand this second day of October, 1872.

“Evan Williams.”

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That the plaintiff did at the request of the defendant, as aforesaid, procure moneys to be lent to him, amounting together to 645*l.* for the purposes aforesaid, and the defendant was thereby enabled to carry on the works, and to purchase other shares in the said company. That the defendant did within six months after the 1st of March, to wit, on the 28th of March, 1873, procure an agreement to be made between the Briton Ferry Gas Works Company and the defendant and the local board of the district of Briton Ferry, whereby it was agreed between the parties thereto (subject to the sanction of Parliament, which was afterwards and within the said period of six months obtained) that the company and the defendant should sell to the local board, and the local board should buy of the company and the defendant the Briton Ferry Gas Works and the interest of the defendant as lessee thereof, for the sum of 666*l.* 10*s.* That all conditions were fulfilled, and times elapsed, &c., and the sanction of Parliament was before the breach hereinafter mentioned duly obtained to the agreement of March, 1873, between the company and the defendant and the local board. Breach, that though more than six months have elapsed since the 1st of March, the defendant did not employ the plaintiff in or about the carrying out of the last-mentioned agreement, or in or about carrying out any sale of the gas works, nor permit the plaintiff to have the carrying out of the last-mentioned agreement, or of any such sale as aforesaid, and has not paid to the plaintiff a commission of 4*l.* per cent. or any commission on the purchase money in lieu of costs or otherwise, but has wholly refused to pay any commission, and the plaintiff claims 266*l.* 9*s.*

Plea, that the agreement in the declaration mentioned was an agreement in writing made by the plaintiff, who then was an attorney and solicitor of Her Majesty's Courts at Westminster, and then was the defendant's attorney and solicitor, and was made with the defendant as his client respecting the amount and manner of payment for future services, fees, charges, and disbursements in respect of business to be done by the plaintiff as such



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attorney and solicitor, and as a conveyancer for the defendant as his client in that behalf, the same not being business to be done in any action at law or suit in equity, nor in any Court, and the amount payable under the agreement exceeding 50*l.*, and that the same was by both parties to it intended to be made in pursuance and subject to the provisions of the Attorneys and Solicitors Act, 1870.

Demurrer to the plea and joinder. The demurrer was argued first on the 26th of January, before Bramwell, B., and Pollock, B., by *Anstie*, for the plaintiff, and *Roland V. Williams* for the defendant. After taking time to consider, the Court desired that the case might be re-argued.

Accordingly, on April 26,

*Anstie* argued for the plaintiff. Before 1870 such an agreement as that sued on would not have been illegal or void, but the items would have been taxable, and the plaintiff could not have recovered at all unless he had delivered a signed bill under 6 & 7 Vict. c. 73, s. 37, provided the defendant pleaded that defence. *Philby v. Hazle* (1) and *Scarth v. Rutland*. (2) The object of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28 (3)), was

(1) 8 C. B. (N.S.) 647; 29 L. J. (C.P.) 370.

(2) Law Rep. 1 C. P. 642.

(3) By this Act, entitled "An Act to amend the law relating to the remuneration of Attorneys and Solicitors, it is enacted—

Sect. 4. "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at

which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained. Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a Court or a judge to be taken thereon by motion or petition, and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to

to place the attorney in a better, not a worse position. The defendant will say this action is barred by s. 8, "No action or suit shall be brought or instituted upon any such agreement," i. e. such an agreement as is provided for by s. 4. It may be a question whether the agreement sued on is within s. 4 at all; for, obtaining a loan of money and carrying out a sale of gas works do not necessarily require an "attorney or solicitor, or an advocate or conveyancer," and are constantly performed by other persons. If the agreement be not within s. 4, the action is clearly maintainable. But assuming that some portion of the carrying out the sale would bring the agreement within s. 4, then s. 8 must mean that upon

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be cancelled, and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

Sect. 7. "A provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void."

Sect. 8. "No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made, by the Court in which the business or any part thereof was done, or a judge thereof; or if the business was not done in any Court, then where the amount payable under the agreement exceeds fifty pounds, by any superior Court of law or equity, or

a judge thereof; and where such amount does not exceed fifty pounds, by the judge of a county court which would have jurisdiction in an action upon the agreement."

Sect. 9. "Upon any such motion or petition as aforesaid, if it shall appear to the Court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such Court or judge by rule or order, in such manner and subject to such conditions, if any, as to the costs of such motion or petition as such Court or judge may think fit; but if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void, and the Court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges, and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made; and the Court or judge may also make such order as to the costs of and relating to such motion or petition, and the proceedings thereon, as to the said Court or judge may seem fit."

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any such stipulation as is contemplated by s. 4, viz. a stipulation that the attorney shall be paid by a gross sum or commission, &c., no action shall be brought to recover the remuneration. It cannot mean that no action shall be brought upon any agreement which contains such a clause; for, if so, the client could not sue his attorney for negligence in carrying out, or a refusal to carry out, such an agreement. Suppose an agreement that the attorney should find funds to carry on a suit, and the attorney refuses in the middle of the suit. The mischief may be irreparable. Is the client to have no damages, nor any right of action? If so, clients are worse off since the Act than before. It is no answer to this to say that s. 8 enables "the Court or a judge" to "enforce the agreement without suit or action on motion or petition." Assessing damages for the breach of an agreement is not "enforcing it;" and if it were, assessing unliquidated damages on motion or petition is an unheard-of proceeding, and one for which there is no machinery provided in the Act or otherwise. "Enforcing" such an agreement can only relate to the amount of costs; it must mean requiring the client to pay the agreed costs, or such part as the Court may think fair and reasonable under s. 9; and this supposes the work to have been done. This construction makes the whole statute consistent, and s. 8 will mean that no action shall be brought upon that part of an agreement which relates to costs, when the work has been done, but the attorney shall obtain payment by motion or petition to the Court or a judge. In this view the present action is clearly maintainable, for it is not an action to obtain payment for work done, but for damages for not allowing the attorney to carry out the agreement and earn his commission.

*Giffard, Q.C. (Roland V. Williams with him)*, for the defendant. Negotiating loans is part of an attorney's business; and carrying out a sale includes the preparation of a conveyance, the special province of an attorney. Moreover, the plea asserts, and the demurrer admits, that the agreement was for "business to be done by the plaintiff as such attorney," &c. The plaintiff cannot, therefore, deny that the agreement falls within s. 4. Then s. 8 is clear and unqualified that no action shall be brought upon any such agreement. "Enforcing" an agreement must be read in the popular sense of giving a remedy for a breach. It is natural that the

legislature should desire to substitute the Court and a master for a jury in assessing the amount; for a jury can give only such an amount as a master would tell them was fair and reasonable. The Court, through its masters, assesses damages every day in arbitrations under the Common Law Procedure Act, 1854; and there is therefore nothing new in that idea. Perhaps s. 8 ought to be read, "no action shall be brought by the attorney upon any such agreement," and this construction will remove the difficulty as to actions for negligence by the client. Sect. 7 shews that "such agreement" must receive a wider construction than the plaintiff gives; but for the present question it is sufficient to say that upon the plaintiff's own construction the action is barred, for though in form for not employing the plaintiff, it is really for the amount of the commission, and a judge must tell a jury to give that amount.

*Anstie*, in reply. The measure of damages will not be the amount of the commission, for the jury must of course make a deduction for the fact that the plaintiff has not had to spend his time and labour. There is not a word in the Act to shew an intention to distinguish between actions by clients and actions by attorneys. The defendant has a remedy given him by s. 9, to set aside this agreement if it is not "fair and reasonable" in the opinion of the Court, but he has not chosen to exercise this remedy.

*Cur. adv. vult.*

April 27. KELLY, C.B. The case is certainly one of considerable importance, and at first sight it might appear to raise a question of some difficulty; but when it is seen that the word "agreement" in s. 8 of the Attorneys and Solicitors Act, 1870, means, when applied to the case before us, not the entire contract between the parties, but only the single particular stipulation for the remuneration of the attorney by way of commission, the difficulty is at once solved. The agreement in question was in effect that the defendant would employ the plaintiff to act as his attorney in a certain transaction of considerable importance to both parties, and the allegation is that the defendant refused to employ him, and the plaintiff claims damages by reason of that

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refusal. The agreement contained a stipulation that upon the performance of the duties, and upon the execution of the business to be entrusted to the plaintiff, he should receive as remuneration a commission of 4 per cent. Under the Act of 1870 that was a valid stipulation, but with this qualification, that no action could be brought upon it. Either party to that stipulation may apply, by motion or petition, to the Court, who have power, under ss. 8 and 9 of the Act, to examine and determine every question respecting the validity or effect of the agreement or stipulation, and if they think it fair and reasonable, to enforce it upon terms; or if they consider the stipulation unreasonable, they may declare that the stipulation is void, and the business being done, that the attorney shall be remunerated as if such stipulation had not been made. In truth, upon such a stipulation considered by itself, the Court have power, upon motion or petition, to decide the whole case between the parties according not merely to law, but to justice and good sense. In this view, and confining the operation of the Act of Parliament to the particular stipulation in question, effect might be given not merely to every provision, but literally to every word that is found in any one of the sections of the Act.

On the other hand, the statute is supposed to be this, that upon an agreement being entered into between an attorney and his client, or one who is about to become his client, not only a stipulation of that nature, but every term and engagement to be found throughout what might be a very long and multifarious agreement, should be within the jurisdiction of the Court upon motion, and that no action could be maintained upon it. That construction would be so startling and unreasonable, that, unless we were compelled by the express language of the Act itself, it would be impossible to adopt it without doing great injustice. Take this very case for an example. An attorney is not merely engaged, but has prepared himself, and it may be at considerable expense, to carry out on behalf of a client the sale of a large estate for a considerable sum of money, and he would have been entitled to a large commission if he had been allowed to transact the business. On the other side, the client might have cause to complain that while he was ready to employ the attorney to effect this sale, and conduct the transaction from begin-

ning to end, the attorney had refused to do so, and the consequence might be that he would have lost the sale of an estate for a very large sum of money, and if he were to sell the estate at all, he might be obliged to sell it at a very considerable loss. That is a case which has nothing to do with the law of attorneys in respect of remuneration for business to be done. It is the common case of an action between one man and another, in which it is possible that the complainant may recover very large damages, and which it is impossible to suppose that the legislature (unless they used language which would admit of no other construction) intended to be determined upon motion in Court. To shew this still more strongly let me put this case: suppose there had been a separate and collateral clause that the attorney should receive the son of the client as articulated clerk upon payment of 100*l.*, and that clause in the agreement was not carried out, it is impossible to imagine that the legislature intended that the attorney should not be able to maintain an action to recover the 100*l.*, but must call upon the Court to decree payment of the 100*l.* The difficulty of holding that the Court is, upon motion, to enforce the agreement, is insuperable. If that means, as the language of the Act would seem to import, that the Court is to compel the performance of the agreement, it would be conferring upon this Court a jurisdiction which it does not possess,—to decree specific performance of an agreement which might be in any imaginable form. The agreement might contain other stipulations, embracing every description of engagement which it is possible for one man to enter into with another. To suppose all this was intended, and with nothing in the Act to render it necessary, is, I think, to put a construction upon the Act which is unreasonable, and which in many cases would be mischievous in the extreme.

The whole question turns upon the meaning of the word “agreement” in s. 8. That may be dealt with in, I think, an unanswerable and unobjectionable manner, by holding that it applies not to the entire contract between the parties, but only to the particular stipulation for the attorney’s remuneration, which evidently it was the object of the legislature to deal with, and in respect of which it was intended to confer a peculiar jurisdiction upon the Court.

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Upon these grounds I think the plaintiff is entitled to judgment.

BRAMWELL, B. I am entirely of the same opinion. I have now heard this case argued twice. At the end of the first argument, owing, I suppose, to the ingenious observations of Mr. Roland Williams, who argued it then, I was not free from doubt, but having had time to consider the question since, and having heard it again argued, I am clear that the plaintiff is entitled to judgment, and have no misgivings.

Just consider what the proposition is for a moment. Here is an agreement which before the statute would beyond question have been a perfectly valid agreement, except as to the clause that the plaintiff should be paid a fixed sum, and an action would have been maintainable upon that agreement by the plaintiff for not employing him, or by the defendant against the plaintiff for negligence if the plaintiff had been employed and had been guilty of negligence; and an action for work and labour done might have been maintained if the work and labour had been done.

Now it is said that in some way the legislature has enacted that such an action shall not be brought in future. It would be very strange if they had, and one cannot see why they should. One would think, if they did anything so remarkable as to say an action should not be brought against an attorney for negligence because of particular stipulations in the agreement, they would take care to express it in very strong language, which certainly they have not done. The only ground upon which such a proposition can be maintained is that the word "agreement" is used in s. 8, and it is provided that no action shall be brought upon "any such agreement." What is meant by "any such agreement?" You will find it mentioned in s. 4, which says that such an agreement shall be valid; that is not the entire agreement, but the particular agreement that something other than taxed costs may be agreed for. If you incorporate those words in s. 8 it means that no action shall be brought upon the agreement to pay the costs agreed for other than taxed costs. Then no action can be brought to enforce that; but that of itself supposes the work is done, and when you come to look at the rest

of s. 8 and s. 9 it is manifest that what the legislature had in view was this, when the work is done and the money is earned the payment shall not be enforced by action, but application shall be made to any superior Court of law or equity or the county court, according to the amount in dispute, in order to ascertain whether the stipulation is a reasonable one, and whether it shall be enforced or not.

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Then it was gravely said, "You are enforcing an agreement which has been irreparably broken if you award damages for the breach of it." That is equivalent to saying, "You enforce an agreement to marry by making the man who will not marry pay damages for not having married;" and that seems to me something like nonsense. When one looks, therefore, at the words that have been used, at the insuperable difficulties that are in the way of supposing the Court could try every question arising upon agreements of this description (such questions as my Lord has referred to), it seems impossible to have any doubt. The difficulty has entirely arisen from the unfortunate use of the word "agreement," instead of saying "so much of the agreement," or "that part of the agreement relating to the payment of an agreed sum of money," or some such words.

POLLOCK, B. At the close of the first argument I not only entertained considerable doubt with regard to the construction of this Act, but I confess I was rather inclined to think the language was so marked as to prevent the plaintiff from maintaining the present action. The further argument I have heard, and the reasons that have been adduced by my Lord and my Brother Bramwell have induced me to think decidedly that the action is maintainable. When I look at the whole intention of the Act, which clearly is pointed not to the entirety of an agreement of this kind, but merely to so much of it as relates to the mode in which the attorney shall be remunerated, and also when I look at ss. 8 and 9, which seem to assume that when the Court interferes it shall be in respect of matters arising out of what has been done under the agreement, and not in respect of matters that may arise out of a breach of the agreement, and when I further see that if the construction contended for by the defendant were the correct



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one it would lead this Court to a new mode of procedure and practice hitherto unknown to it, all of which must be supposed to have been in the contemplation of the legislature when this Act was passed—I come to the conclusion that s. 8 was intended to apply merely to that portion of any agreement between an attorney and his client whereby the mode of remuneration was to be governed.

I think, therefore, that the plaintiff is entitled to maintain his action.

AMPHLETT, B., concurred.

*Judgment for the plaintiff.*

Attorneys for plaintiff: *Vizard & Co.*

Attorneys for defendant: *Gover & Norton, for Gover, Swansea.*

May 7.

DALBIAC AND OTHERS v. DELACOURT AND ANOTHER.

*Practice—Ejectment—Costs on Judgment for Plaintiff by Consent.*

When the real defendant in an action of ejectment appears and consents that the plaintiff shall sign judgment, the plaintiff is entitled to costs, though the case is not specifically provided for by the Common Law Procedure Act, 1852.

EJECTMENT. The writ, issued on the 30th of June, 1874, was directed to Greenfield and others, the tenants in possession, who did not appear. The defendants Delacourt and another appeared separately to defend as landlords for certain specified portions of the premises, and the plaintiffs signed judgment for non-appearance in respect of the remainder. On the 23rd of July a judge's order was made by consent "that the plaintiffs be at liberty to sign judgment against Alfred Laureston Delacourt and John Scoltock, as landlords, in respect of the premises Nos. 65, 67, and 69, Chatham Street, with stay of execution for six weeks from this date."

In February, 1875, the plaintiffs took out a summons for taxation of their costs, but the Master, being of opinion that they were not entitled, dismissed the summons, and the question was afterwards referred by Mellor, J., at Chambers to the Court. A

rule having been obtained calling on the defendants Delacourt and Scoltock to shew cause why they should not pay to the plaintiffs their costs of suit under the judgment signed therein, or why the order of the 23rd of July should not be amended, by adding a provision that the defendants should pay to the plaintiffs their costs of suit ;

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*Beasley* shewed cause. The plaintiff can only be entitled to costs if they are given him by the Common Law Procedure Act, 1852, and that Act gives the claimant costs only upon "a finding for the claimant" under s. 185, or where the defendant "confesses the action" with the prescribed formalities under s. 203. The present case does not come within either section. Before the Act a defendant could not appear except on the terms of signing a consent rule which provided for costs. If no person appeared, and judgment was entered against the casual ejector, the plaintiff had no other remedy for his costs than by action of trespass for mesne profits: Chit. Pr. 8th ed. (1847), p. 954; *Doe d. Rees v. Howell*. (1) The law is the same now as to judgment for default of appearance under s. 177 of the Act: Day's Common Law Procedure Act, 4th ed. p. 186. The Statute of Gloucester, which enacted that "the plaintiff in all actions in which he recovers damages shall also recover against the defendant his costs of suit," does not apply to actions of ejectment, for the plaintiff does not recover damages.

[BRAMWELL, B. (after referring to Tidd's Practice and Tidd's Forms). Before the Common Law Procedure Act, 1852, the declaration in ejectment claimed damages, and the plaintiff who recovered a verdict against the real defendant recovered damages, though he usually remitted them.]

*Bompas*, for the plaintiffs, in support of the rule. The passage cited from Chit. Pr. only applies to actions where there was no appearance. Before the Common Law Procedure Act, 1852, costs were recoverable against the real defendant in ejectment after appearance, as in other actions. The Common Law Procedure Act, 1852, s. 207, says in the broadest terms, "The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used." Therefore, since costs would have followed under the old law upon

(1) 12 Ad. & E. 696.

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a judgment for the plaintiff by consent against the real defendant, they follow now.

BRAMWELL, B. The rule must be absolute. The validity of the order is not in dispute. The general notion entertained has been that costs follow upon a judgment for the plaintiff in ejectment. If we were to discover that costs did not follow in the old action before the Common Law Procedure Act, there might be some difficulty in seeing how they could follow since the Act, but it is manifest from the books that where the judgment was against the real defendant costs followed; the judgment was in form for damages and costs, though a "*remittitur damna*" was usually entered. (1) Is there any reason for supposing that the Common Law Procedure Act has made any alteration? None but the argument that the Act has enumerated many cases in which it expressly awards costs, and the present case is not among the number. But that enumeration does not profess to be an exhaustive one; particular cases are provided for, but mention of these does not exclude the case of an ordinary judgment for the plaintiff lawfully obtained.

It was argued that since by the present form of judgment no damages are recovered, the Statute of Gloucester does not apply to actions of ejectment. But that is not so; the alteration of the form of judgment ought not to take the action out of the operation of the statute. I think, therefore, that the plaintiff is entitled to costs.

Then it was said that the order being the subject of a bargain, it must be taken to have contained the whole of the terms, and that if it had been intended that the plaintiff should have costs, it should have been so stated in the order. But I think we must read the order as a bargain that the plaintiff shall have judgment with its ordinary incidents. If nothing had been said about execution, could it have been said that this was an agreement for judgment only, and that no execution could follow? Certainly not. Therefore if the defendants agreed for judgment against them, they must be taken to have agreed for costs.

(1) 3 Bl. Com. Bk. 3, Ch. 11, pp. 199, 205; and App. No. 2, 17th ed.; 2 Chit. Pr. Ch. 25, p. 1319, 8th ed.

CLEASBY, B. I am of the same opinion. We have to construe the order, and the question is what the bargain was. The concluding clause, which provides for stay of execution, is an argument for the plaintiff's view, on the principle of "expressio unius exclusio alterius," and shews that except in that particular the plaintiffs were intended to be placed in the same position as they would in other cases where they are at liberty to sign judgment. Here the defendants appeared as landlords, and in every case in which the real defendant appeared in ejectment, judgment for the plaintiff carried costs. In the ordinary form of signing judgment, the judgment is for *l. costs.*

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DELA COURT.*Rule absolute.*Attorney for plaintiffs: *Parkers.*Attorneys for defendants: *Lewis & Sons.*

## CASTRO v. MURRAY.

May 8.

*Practice—Petty Bag Office—Sealing Writ of Error in Misdemeanor—12 & 13 Vict. c. 109, s. 38—Fiat of Attorney General—Staying frivolous and vexatious Action.*

It is the duty of the clerk of the petty bag office in the Court of Chancery not to seal a writ of error in cases of misdemeanor until the Attorney General has issued his fiat.

The plaintiff having been convicted of a misdemeanor, prepared a writ of error, and requested the clerk of the petty bag office to seal it in pursuance of 12 & 13 Vict. c. 109, s. 38. The clerk having refused, on the ground that the Attorney General had not issued his fiat, the plaintiff brought an action against the clerk claiming damages for the refusal, and a mandamus to compel the clerk to seal the writ:—

*Held*, that the action must be stayed, as being frivolous and vexatious, and an abuse of the process of the Court.

THE defendant is the clerk of the petty bag office in the Court of Chancery. The declaration, delivered the 17th of March, 1875, alleged that an indictment against the Plaintiff, called Thomas Castro, otherwise Arthur Orton, otherwise Sir Roger Charles Doughty Tichborne, Baronet, of which the first count charged perjury in Middlesex, and the second charged perjury in the city of London, was found at the Central Criminal Court, and removed by



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certiorari into the Court of Queen's Bench, and there tried at bar by a jury of the county of Middlesex, the trial beginning the 23rd of April, 1873, and ending the 28th of February, 1874, in the vacation, on which last day the plaintiff was found guilty by the jury, and sentenced by the Court to a term of seven years penal servitude on each count, the second term to commence at the end of the first: and was now undergoing the sentence: that the plaintiff feeling aggrieved, and believing that there were many manifest errors in the record and process, and that if he could by writ of error cause a transcript of the record and proceedings of the indictment to be sent to the Court of Exchequer Chamber to be reviewed and examined, the trial, verdict, and judgment would be set aside and reversed for the said errors; and that a writ of error was the necessary, lawful, and regular process for procuring such review and examination, duly prepared a writ of error for that purpose, and requested the defendant, as the clerk of the petty bag, to seal it; that it was the duty of the defendant as such clerk, upon the plaintiff tendering the writ and requesting him to seal it, and complying with all the rules then in force for regulating the practice of the common law side of the Court of Chancery, and upon paying or tendering all lawful fees, to duly seal the writ; that the plaintiff had complied with all the rules, and tendered all the lawful fees, and all conditions had been fulfilled, &c. Nevertheless the defendant wrongfully refused to perform his duty and to seal the writ, whereby the plaintiff had been prevented from having the said record and proceedings reviewed and examined in the Court of Exchequer Chamber, and obliged to continue to undergo the sentences of penal servitude, and would be obliged to endure the same to the end of the terms, and had been and would be prevented from recovering possession by law of divers estates of the value of 400,000*l.*, to which he claimed to be entitled, and was otherwise injured, and the plaintiff claimed 500,000*l.*

The second count claimed a writ of mandamus, commanding the defendant to seal the writ of error.

The defendant did not plead, but on his application Huddleston, J., made an order at Chambers, on the 8th of April, staying all further proceedings in the action on the ground that it was frivolous and vexatious, and an abuse of the process of the Court.

This order was made upon an affidavit of the defendant, which stated that the plaintiff was tried, convicted, and sentenced as alleged in the declaration; that on the 12th of February, 1875, a writ of error in the said case of *Reg. v. Castro* was tendered to him to be sealed on behalf of the plaintiff, but the Attorney General not having issued his fiat the defendant refused on that ground, and not otherwise. The affidavit proceeded: "It would be contrary to my duty as such clerk, and contrary to the established regulations and practice of the petty bag office, to seal any writ of error in any criminal case without the fiat of the Attorney General. The rule on this point is precise and inflexible, and I had no option but to decline to seal the writ without the production of the Attorney General's said fiat. Had I done otherwise, I should have been disobeying the regulations of the said office. I am informed and believe that before the application to myself the plaintiff's attorneys, on behalf of the plaintiff, applied to the Attorney General to issue his fiat for a writ of error, but that the Attorney General, having considered the matter, refused to issue the fiat."

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*Philbrick, Q.C.* (*O'Brien* with him) now moved for a rule to rescind the order of Huddleston, J. It is admitted that in felonies a writ of error for the reversal of a judgment is a writ of grace not of right; but in misdemeanors it is contended that it is *ex debito justitiæ*. In the *Aylesbury Case* (1) it is recorded that Paty and others, burgesses of Aylesbury, having brought actions against the constables for hindering them from voting, were committed to Newgate by the House of Commons, and having sued out writs of habeas corpus, were remanded to Newgate by three of the judges of the Queen's Bench, Holt, C.J., dissenting. Paty and another then petitioned the Queen for a writ of error in order to bring this judgment before the Queen in Parliament. The Queen having referred it to all the judges, whether she ought to grant the writ "*ex debito vel merito justitiæ*," or "*ex gratiâ*;" all but two were ultimately of opinion, "that a writ of error in this case ought to be granted of right and not of grace," without giving any opinion whether a writ of error lay in that case, that being a question

(1) 14 How. St. Tr. 862.

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proper to be determined in Parliament: see *Burdett v. Abbott*. (1) In the *Aylesbury Case* (2) the representation and address of the House of Lords to the Queen in 1704, refers to the resolution of the House of Commons passed in 1689, in *Sir Thomas Armstrong's Case* (3), and says: "We are sure the House of Commons in the year 1689 was of opinion that a writ of error, even in cases of felony and treason, is the right of the subject, and ought to be granted at his desire, and is not an act of grace and favour which may be denied or granted at pleasure; so that as far as the opinion of the House of Commons ought to have weight in such a question (whatever the present opinion of that House is) they then thought a writ of error was the right of the subject in capital cases (where only it had been at any time doubted of). But that it is a writ of right in all other cases has been affirmed in the law books, is verified by the constant practice, and is the opinion of all your present judges, except Mr. Baron Price and Mr. Baron Smith." (4) This address is said to have been drawn up by a committee presided over by Lord Somers. In *Rex v. Wilkes* (5) Lord Mansfield, referring to the *Aylesbury Case* (2), says: "In the 3rd of Queen Anne ten of the judges were of opinion 'that in all cases under treason and felony a writ of error was not merely of grace, but ought to be granted.' Price and Smith were of a contrary opinion, 'that a writ of error was of grace only in all criminal cases.' The ten did not mean 'that it was a writ of course,' but that 'where there was probable error, it ought not to be denied.' It cannot issue now without a fiat from the Attorney General, who always examines whether it be sought merely for delay or upon a probable error. . . . This opinion, in the 3rd of Queen Anne, has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanor, if there be probable cause, it ought not to be denied; this Court would order the Attorney General to grant his fiat." This latter dictum, however, of Lord Mansfield was expressly overruled in *Ex parte Newton* (6), where the Queen's Bench refused an application for a rule nisi to order the Attorney General to issue his fiat for a writ

(1) 14 East, 92, note (b.)

(2) 14 How. St. Tr. 862.

(3) 10 How. St. Tr. 117.

(4) 14 How. St. Tr. at p. 870, and

see p. 874.

(5) 4 Burr. at pp. 2550-1.

[(6) 4 E. &amp; B. 869, 871; 24 L. J. (Q.B.) 246.]

of error in a case where Newton had been convicted of a misdemeanour. The Court held that a probable cause being shewn, the Attorney General, *ex debito justitiæ*, ought to grant his fiat, and that if he refused to hear and consider the application for a fiat the Court would compel him to do so by mandamus; but that when he had heard, and considered, and refused, the Court could not review his decision or interfere. In *Reg. v. Lees* (1) the Court of Queen's Bench confirmed their former opinion, and held that it was "a part of the prerogative of the Crown that a writ of error should not issue except with the concurrence of the Crown, testified by the fiat of the Attorney General." The plaintiff has, therefore, no remedy except the present action. In *Rex v. Rowe* (2) the Lord Chancellor of Ireland granted an order, directing the cursitor to seal a writ of error to the House of Lords in a misdemeanor. The cursitor had required the warrant of the lord-lieutenant, which it was not the practice to grant without the fiat of the Attorney General, and this the Attorney General had refused, on the ground that it was mere matter of form and unnecessary. The Lord Chancellor seemed to think that the writ of error was of common right. It is not for the defendant to determine whether the fiat of the Attorney General is a condition precedent to the issuing of the writ. His duties as clerk of the petty bag are defined by 12 & 13 Vict. c. 109; s. 38 of which enacts that when the fees are paid and the rules complied with (as in this case they have been) the writ shall be duly sealed. For refusal to seal the writ an action will lie, as in the analogous case of *Barry v. Arnaud*. (3) The defendant can demur if he desires to discuss that question; and that is the proper mode of discussing it. There is no allegation of malice against the defendant; the action is brought to try a constitutional right of great importance to subjects of the realm.

[BRAMWELL, B. Why do you not apply to the Court of Chancery itself to direct the writ to issue?]

We claim a mandamus in this action. The Court of Chancery on its common law side can quash the writ of error if when error is assigned the grounds appear to be frivolous. It ought not to be

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(1) 27 L. J. (Q.B.) 403, 406.

(2) 2 Mol. Ir. Ch. Rep. 27.

(3) 10 A. &amp; E. 646.



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assumed beforehand that the grounds will be frivolous. If this rule is refused there will be a denial of justice, for the plaintiff will be summarily prevented from trying a question which ought to be deliberately discussed, and which he cannot try in any other mode. An action to try such a question cannot be said to be frivolous or vexatious.

[The Court (Bramwell and Cleasby, BB.) having consulted Kelly, C.B., and Pollock and Amphlett, BB., delivered judgment.]

BRAMWELL, B. We think there ought to be no rule in this case, and that the order of my Brother Huddleston was perfectly correct. It has been sworn by the defendant, in an affidavit before us, and it is within our own knowledge, that it is his duty not to seal the writ until the fiat of the Attorney General has been procured. That is our judgment.

But it will be said, how do we dispose of the opinions and authorities (so far as they are authorities) cited to the effect that a writ of error in cases of misdemeanor is a writ *ex debito justitiæ*? The answer is, that they raise a question for the Attorney General to decide, and he must deal with those expressions of opinion if he thinks them binding upon him when they come before him. But we are perfectly satisfied that there is no duty in the defendant to seal the writ till the Attorney General has issued his fiat.

This action, therefore, is pretenceless, and has been properly stopped. I do not say it was malicious—in one sense, it may be said to be vexatious—but it is absolutely groundless, and it is one in which the Court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the Court.

It is always a strong measure to prevent a plaintiff from going on with his action; and we, therefore, decided not to confirm this order till we had consulted the Lord Chief Baron and my Brothers Pollock and Amphlett, all of whom concur in the opinion which I have delivered.

CLEASBY, B. I am entirely of the same opinion. The only obligation or duty in the defendant is one attaching to him as a ministerial officer, and it does not arise until the fiat of the At-

torney General has issued. This is an action for an injury alleged to be sustained by the plaintiff brought against a ministerial officer for not doing what it is quite plain he was not bound to do till the fiat was issued.

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If the defendant had refused to seal the writ after the fiat of the Attorney General had issued, a very different question would have arisen.

*Rule refused.*

Attorney for plaintiff: *C. Harcourt.*

Attorneys for defendant: *Raven & Hare.*

END OF EASTER TERM, 1875.

# CASES

DETERMINED BY THE

## COURT OF EXCHEQUER,

AND BY THE

## COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER.

IN AND AFTER

TRINITY TERM, XXXVIII VICTORIA.

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BELLAMY *v.* HOYLE.

June 1.

*County Court Acts* (9 & 10 Vict. c. 95), ss. 31, 33, 78, 94—(30 & 31 Vict. c. 142), s. 22—*Warrant of Distress against High Bailiff—Special Appointment by Registrar of Bailiff to execute Process—Power of Courts to execute Process.*

Where the judgment debtor under county court process is himself the high bailiff of the court, a special bailiff may be appointed to levy execution, and the warrant may be directed to him and others, although the Acts, 9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142, contain no express provision upon the subject.

The plaintiff was high bailiff of a county court, the defendant being one of the registrars of the court. An inquiry having been held under 9 & 10 Vict. c. 95, s. 116, which enables the judge to inquire in a summary way into any charge of extortion against a bailiff, and to make an order for the payment of such damages and costs as he shall think just, orders were made by the judge for the repayment by the plaintiff of fees overcharged by him, with costs to be taxed by the registrar. The costs were taxed by the defendant, without reference to the judge, and in the absence of the plaintiff. The plaintiff was served with orders to pay the overcharge, penalties, and taxed costs, but he objected to pay the costs. Application was then made to the defendant as registrar for warrants of execution against the plaintiff, and he issued warrants directed to "R. and others," and delivered to R. a written authority to act as assistant bailiff in the execution of the process, describing it as issued under 30 & 31 Vict. c. 142, s. 22, which directs that "every bailiff duly appointed by a high bailiff or a registrar may serve or execute any process which by any Act passed or to be passed is directed to be

served or executed by a high bailiff, unless otherwise specially provided against therein." R. having seized the plaintiff's goods under the warrants, the plaintiff sued the defendant in trespass:—

*Held*, first, that the warrants were not made illegal by what took place with reference to the costs, for s. 116 did not require the judge to settle the amount of the costs, and that at any rate the warrants themselves were based upon orders good on the face of them; secondly, that, though 30 & 31 Vict. c. 142, s. 22, was inapplicable, yet as the Act 9 & 10 Vict. c. 95, s. 78, after providing for rules and forms, concluded that in any case not expressly provided for, the general principles of practice in the superior courts of common law might be applied to proceedings in the county courts, it must be taken that the appointment of R. as special bailiff, was like the appointment of an elisor to execute process in the superior Courts, and it was also justified by the inherent power of all Courts, and the necessity of the case, and that the defendant was entitled to judgment.

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ACTION for trespass by the defendant upon the house and premises of the plaintiff, and for the conversion of his goods. The following case was stated for the opinion of the Court:

1. The plaintiff was at the time of the alleged trespass high bailiff of the county court of Rotherham, and the defendant was and is one of the registrars of the court.

2. In February, 1873, certain complaints were made against the plaintiff of having taken fees under executions levied by him in excess of the sums allowed by law, and of having extorted fees where none were due. The judge of the county court directed that notice of these complaints should be given to the plaintiff, and accordingly lists were delivered to him. Of these twenty-nine were framed under 9 & 10 Vict. c. 95, s. 116 (1), which provides

(1) By 9 & 10 Vict. c. 95, s. 31, "for every such court (i.e. county court under the authority of the Act) there shall be one or more high bailiffs whom the judge shall be empowered by order of court to appoint, and in case of inability or misbehaviour to remove by a like order (this power of removing was by 13 & 14 Vict. c. 61, transferred to the Lord Chancellor or the Chancellor of the Duchy of Lancaster); and every such high bailiff shall be empowered, subject to the restrictions hereinafter contained, by any writing under his hand to appoint a sufficient number of able and fit persons, not

exceeding such number as shall be from time to time allowed by the judge to be bailiffs, to assist the said high bailiff, and at his pleasure to dismiss all or any of them, and appoint others in their stead, and every bailiff so appointed may also be suspended or dismissed by the judge."

By s. 33 "the said high bailiffs, or one of them, shall attend every sitting of the court for such time as shall be required by the judge, unless when their absence shall be allowed for reasonable cause by the judge, and shall by themselves or by the bailiffs appointed to assist them as aforesaid, serve all the summonses



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that, "If any clerk, bailiff, or officer, of the court, acting under colour or pretence of the process of the said court, shall be charged with extortion or misconduct, or with not duly paying or accounting for any money levied by him under the authority, it shall be lawful for the judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties in like manner as the attendance of witnesses in any case may be enforced, and to make

and orders, and execute all the warrants, precepts, and writs issued out of the court, and the high bailiff and bailiffs shall in the execution of their duties conform to all such general rules as shall be from time to time made for regulating the proceedings of the court as hereinafter provided, and subject thereunto to the order and direction of the judge. . . ."

By s. 78 general rules are to be made for regulating the practice and proceedings of county courts, and forms are to be framed for every proceeding in which it is thought necessary, and the rules so made and the forms so framed shall be observed and used in all the courts holden under this Act, and in any case not expressly provided for therein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied at the discretion of the judges to actions and proceedings in their several courts.

By s. 94, "whenever the judge shall have made an order for the payment of money the amount shall be recoverable in case of default or failure of payment thereof forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels of the party against whom such order shall be made, and the clerk of the said court, at the request of the party prosecuting such order, shall

issue under the seal of the court a writ of fieri facias as a warrant of execution to the high bailiff of the court, who by such warrant shall be empowered to levy, or cause to be levied, by distress and sale of the goods and chattels of such party, such sums of money as shall be so ordered, wheresoever they may be found within the district of the court, whether within liberties or without, and also the cost of the execution, and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such warrant."

The County Courts Act, 1866 (29 & 30 Vict. c. 14), makes provision for the future abolition of the office of high bailiff and the performance of his duties by the registrar.

By 30 & 31 Vict. c. 142, s. 21, "every registrar who may be invested with the powers and authorities of a high bailiff under the provisions of "the County Courts Act, 1866," shall also be invested with the powers and authorities possessed by the high bailiff to the performance of whose duties he may succeed."

By s. 22, "every bailiff duly appointed by a high bailiff or a registrar may serve or execute any process which by any Act passed or to be passed is directed to be served or executed by a high bailiff, unless otherwise specially provided against therein."

such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied as aforesaid, and for the payment of such damages and costs as he shall think just; and also, if he shall think fit, to impose such fine upon the clerk, bailiff, or officer, not exceeding 10*l.* for each offence, as he shall deem adequate; and in default of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court."

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3. The cases were heard, and the judge gave his decision on the 29th of August, 1873. In seventeen cases sums varying from 10½*d.* to 10*s.* were found to have been overcharged or extorted, and were ordered to be returned to the parties. In other cases fines were inflicted. The gross amount ordered to be returned was 1*l.* 10*s.* 4½*d.*, and the fines in all amounted to 29*l.*

4. The learned judge also ordered the plaintiff to pay all the costs of the inquiry when judgment was given for the complainants, and also in some cases where the plaintiff had been guilty of irregularities, and he also directed that the question of costs should be settled by the registrar, and that all the orders for the payment of money should be made for Monday, the 8th of September then next.

5. On Saturday, the 6th of September, at about 5 p.m., the plaintiff was served with an order in the case of *Jowett v. Cooke*, one of the cases, to pay on or before the 8th of September next to the registrars of the court 2*s.* for costs or fees overcharged and received by him from L. Cooke, and 14*l.* 6*s.* 11*d.* for costs, and the further sum of 10*l.* as a penalty for making such overcharge, to the registrars for the use of the Court.

6. The plaintiff was at the same time served with similar orders in the other sixteen cases decided against him. The costs ordered to be paid in the seventeen orders amounted in the aggregate to 243*l.* 12*s.* 7*d.*

7. On Monday, the 8th of September, the amounts ordered by the judge to be returned (1*l.* 10*s.* 4½*d.*) and the fines (29*l.*) were tendered to the registrar by the defendant, but he refused to accept the same unless the costs, amounting to 243*l.* 12*s.* 7*d.*, were

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also paid, and he sent a letter suggesting that the plaintiff should make application to the Court to have the costs taxed or revised. To this letter no reply was sent.

8. The several bills of costs furnished by the complainant's attorneys were examined and taxed by the defendant as registrar in the absence of the parties. The amounts of the bills were taxed according to the county court scale of costs allowed in actions of debt or contract exceeding 20*l*. No detailed account of the bills of costs was furnished to the plaintiff until he applied for them in November, 1873, nor had he nor the attorneys for the several complainants any opportunity of attending the taxation or being heard thereon. The several bills of costs as settled by the defendant were not seen by the judge, nor was his assent to, or approval of, the amounts of the bills obtained by the defendant.

9. On the 12th of September the defendant drew up warrants of execution in thirteen of these cases.

The case set out a copy of one of the warrants, which recited the order for payment, the plaintiff's default, and, after proceeding in the usual form, concluded:—

“Given under the seal of the court this 12th day of September, 1873.

“To William Robinson and others, the bailiffs hereof.

“By the Court,

“Edward Newman,

“William Fretwell Hoyle,

“Registrars of the Court.

	£	s.	d.
“Amount ordered to be refunded . . . . .	0	2	0
“Costs allowed . . . . .	14	6	11
“Fine . . . . .	10	0	0
“Remaining due . . . . .	£24	8	11
“Poundage for issuing the warrant . . . . .	0	16	6
	£25	5	5”

Application was made to the registrar for this warrant at 1.30 p.m. on the 12th of September, 1873.

The following indorsement is upon the warrant :—

“ Address. William Bellamy, high bailiff, Rotherham.

“ Amount ordered to be refunded.

“ This 24th day of September, 1873. Goods sold.

“ William Robinson.”

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10. On the 13th of September the defendant delivered to the Robinson named therein these thirteen warrants and a written authority, of which the following is a copy :—

“ Rotherham, September 13th, 1873.

“ I hereby appoint William Robinson to act as assistant bailiff in the execution of the process of the court issued against William Bellamy, the high bailiff, by virtue of s. 22 of 30 & 31 Vict. c. 142.

“ William F. Hoyle,

“ One of the registrars of the said Court.”

Previously to making this appointment the defendant, on meeting the judge, explained to him the course he intended to pursue with respect to the appointment, upon which the judge expressed an opinion it might be done.

11. On the 13th of September Robinson, in pursuance of the warrants and authority, entered the plaintiff's house and seized and sold his goods.

12. Save in so far as he was appointed such by the said writing, Robinson was not a bailiff of the court, nor authorized to execute the process thereof, but he had previously been an under-bailiff in the employment of the plaintiff.

13. On the 18th of December the plaintiff gave notice that he should apply to the judge of the county court on the 20th of December, 1873, for an order to review the taxation of the costs by the defendant. On the 20th, the attorneys for the complainants appeared by counsel to resist this application, when the advocate for the plaintiff abandoned it without being heard.

14. On the 24th of April, 1874, the plaintiff applied to the Court to rescind the orders for the payment of costs, and for an order for the repayment of the sums levied under the warrants of execution, one of the grounds of his application being that Robinson was not at the time when he executed the warrants a duly



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appointed bailiff of the Court. After hearing the arguments of the attorney for the plaintiff, the judge refused the application, on the ground that the notice of motion was informal, and that he was asked to set aside the notice from the registrar of the order, and not the order of the court itself.

15. It is contended, on behalf of the defendant, that the appointment of Robinson as bailiff was valid under the circumstances appearing in the above case. It is contended, on behalf of the plaintiff, that this appointment was null and void, inasmuch as the plaintiff was at the time when it was so made the high bailiff of the court, and, consequently, that Robinson having seized the plaintiff's goods by the defendant's directions, the defendant is liable to the plaintiff for the act of Robinson in breaking and entering the plaintiff's house and selling the goods.

16. It is also contended, on behalf of the plaintiff, that as the amounts ordered to be paid by the defendant for costs were not submitted to or approved of by the judge, nor assented to by the parties, the defendant had no authority to sign or issue the orders or warrants, and, consequently, that on this ground also the executions were illegal. The defendant, on the other hand, contends that everything connected with the signing and issuing of the warrants and orders by him was done legally and in execution of the orders of the county court, and that under the circumstances stated in this case no personal liability attaches upon him in respect of any acts done by him in relation thereto.

The questions for the opinion of the Court are :—

Whether, under the circumstances above stated, the execution of the warrants by Robinson was legal.

Whether, under the circumstances above stated, the defendant was justified in issuing the orders and warrants.

*Waddy, Q.C. (Cave with him), for the plaintiff.* First, the warrant, so far as it related to costs to be paid by the plaintiff, was invalid. These costs were never properly taxed. They were taxed on too high a scale and in the absence of the plaintiff, and, moreover, the judge could not delegate the power of taxing them to the defendant, the registrar. The Act 9 & 10 Vict. c. 95, s. 27, defines the duties of the registrar, there called the clerk, but

neither by this section nor by s. 166, has he power to tax costs such as these.

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[BRAMWELL, B. But the order is good on the face of it, and the warrant recites this order.]

Secondly, the appointment of Robinson as special bailiff was illegal. There is nothing in the County Court Acts (9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142) to justify such an appointment. To avoid difficulty, the plaintiff might have been dismissed from his office and a new high bailiff appointed, or the warrant might have been addressed to the under bailiff. Sect. 22 of the Act 30 & 31 Vict. c. 142, under which the defendant professed to appoint Robinson, is explained by the previous section, and refers only to registrars invested with the powers and authorities of a high bailiff upon the abolition of his office, under the provisions of the County Courts Act, 1866. The defendant has therefore issued a warrant without jurisdiction, and is liable in trespass: *Houlden v. Smith*. (1)

*Wills, Q.C.*, for the defendant. [He was requested to confine his argument to the question whether the appointment of Robinson made the warrant illegal.] There is no express provision in the County Court Acts relating to a case like the present. But in the absence of express enactment there is an inherent power in every court, as part of its constitution, to appoint an officer to execute its own process. So far back as the reign of Edward III. it is stated that such a power is by implication granted to every court: Lib. Ass. 44 Ed. 3, page 29; and in 1 Rolle's Ab. tit. "Court," p. 526 (F) "Quel chose serra incident al Court," it is said, "si le roy grant un Court per letters pattents al un corporation de un vill a tener pleas, &c., en cest case coment que la ne soit ascun clause en le pattend a faire un bailie, ou sargeant, d'executer les proces del Court, a retourner juries, &c., uncore ceo est incident a lour grant a ceo faire, car autrement ils ne poient tener un Court: Mich. 14 Car. B. R., *en Metcalfe & Worseley's Case*. See also p. 490 (E), translated in Comyns' Dig. tit. "Courts" (P. 8), thus: "If the king grant consuance of pleas, the grantee shall have power to make process by petit cape, process upon voucher, or other process as incident, through no mention of it in the grant."

(1) 14 Q. B. 841; 19 L. J. (Q.B.) 170.

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As to cases where the court is erected by Act of Parliament, Comyns' Dig., tit. "Courts" (P. 4), refers to *Swinstead v. Lyddal* (1), where it was held that the Court of Conscience erected by 3 Jac. 1, c. 15, had by the very erection incidentally and consequentially a power to execute their process.

Secondly, s. 78 of 9 & 10 Vict. c. 95, enacts that in any case not expressly provided for by the rules and forms, the general principles of practice in the superior courts of common law may be applied to proceedings in the county courts. By the practice of the superior courts (Chitty's Archbold's Pract. 12th ed. 671), if the sheriff is party to the proceedings the writ of execution is directed to the coroner, and if the coroner is also a party then to persons appointed by the Court or a master, called elisors. The appointment of Robinson is analogous to the appointment of such an elisor. A further argument in favour of the appointment is found in the necessity of the case. The suggestion that the high bailiff is always to be dismissed where it is proposed to levy execution against him cannot be entertained, and he cannot himself execute a warrant against himself. It is immaterial that the defendant thought he was acting under s. 22 of 30 & 31 Vict. c. 141. It was not the appointment which justified Robinson, but the warrant. Lastly, the defendant merely signed the warrant as a ministerial officer for the purpose of authenticating the order and ought not to be liable: *Dews v. Riley*. (2)

*Waddy, Q.C.*, did not reply.

BRAMWELL, B. We are all of opinion that the defendant is entitled to judgment. I confess I have misgivings as to what the particular question submitted to us means. I rather think, however, that it operates to deprive the defendant of any defence he might have had on the ground that he was a mere ministerial officer, and that the effect of it is, that if Robinson the bailiff would be liable in this action the defendant should be equally so. I am however of opinion that the defendant is not liable. One point made before us was, that by statute it was the office of the judge to say what costs were to be allowed, and it is said that he must personally exercise a discretion in the matter of costs. Now

(1) 1 Salk. 408.

(2) 11 C. B. 434; 20 L. J. (C.P.) 264.

really when we consider that this argument depends on the word "judge" having been used in the section, and that if the word "court" had been there instead the question would not arise (inasmuch as the registrar is the officer of the Court for the purpose of taxing costs), and that the county court and the judge are one and the same thing, I cannot but think that the meaning of the provision is that the Court shall award costs in the ordinary way in which it does so, viz. by their being fixed by the registrar subject to the approval of the judge. But, further, an order, valid on the face of it, was drawn up. If improperly made it should have been set aside; but so long as that order is in existence unimpeached, it must be acted on, otherwise this absurd result would follow: that a valid order would exist, and yet the Court have no power to enforce it.

Then we come to the other question, whether the warrant, having been directed to Robinson and the other bailiffs, was valid, i.e., was there power in the Court, either with or without the assistance of the defendant, to direct a warrant, not to the high bailiff, but to "Robinson and others"? I think there was. In the first place there are the authorities cited by Mr. Wills, shewing that, as incident to the constitution of all courts, there is a power of enforcing their judgments and process. And another argument in support of this proposition is to be found in the necessity of the case, for here the defendant, being high bailiff of the very court from which the process issued, it is not conceivable that an order should issue to the high bailiff to levy on himself, otherwise this absurd consequence must follow: that if an order were made that he should be arrested, he must take himself into custody and lodge himself in gaol. Unless the Court has some power of providing means for procuring execution against the high bailiff, he would be the only one of Her Majesty's subjects not liable to process. So much for the general considerations in the case. Now I turn to the 78th section of 9 & 10 Vict. c. 95, enacting that, in any case not expressly provided for, the rules and principles of the common law shall be adopted. One of those principles is, that if a person to whom process should be directed be interested therein, the process must be delivered to another; for instance, if he should be the sheriff process must go to the coroner, and

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if the coroner be also interested, then to "elisors." Here the high bailiff was interested, and therefore—moulding the practice of the inferior by that of the superior Court—there would be a power to direct a warrant to an individual other than the high bailiff to levy. One doubt which occurred to me was, whether, inasmuch as two "elisors" are appointed in the superior court, two analogous persons should not be appointed in the county court. Perhaps a discussion might be raised on that question, but if there be any difficulty it is obviated by the form in which the warrant is drawn, viz., "to Robinson and others;" so I think there was power to issue this warrant, and I think it immaterial that the person who appointed Robinson supposed himself to be acting under a particular authority, whereas the section of the Act on which he relied as giving him that authority did not really do so. If he had, in fact, power to do it, the rule of law comes in that if a man has a general authority to do an act, and does it, he is justified, although he assumed to do it under a supposed authority which he did not possess. I think this was a properly issued warrant, and am inclined to think that if there had been no other appointment of "elisors" this nomination of them in the warrant would be a sufficient appointment.

The decision I have given renders it unnecessary to consider the other point, as to whether the proceeding in question was the act of the Court, and I express no opinion upon it. As to that it may be observed that it would be very hard if the defendant should be liable for an act which was suggested, not by him, but by the judge.

CLEASBY, B. I am of the same opinion. Upon the first question, viz., as to the order for costs, I think there is no objection whatever to what was done, and the objection could only take the form of a complaint of irregularity; and perhaps application might be made to make the proceedings more regular if they are otherwise. But the judge, having ordered that the high bailiff is to pay costs, says, in the presence of the persons interested, "The registrar will settle the amount." It is clear that, the amount being afterwards settled, the judge adopted it. There can be no doubt that that, in point of law, was the act of the Court.

The remaining question takes two forms: one, as to the liability of the defendant personally, and the other the validity of the warrant. Upon the first I agree that the matter is really not reserved for us as distinct from the question of the plaintiff's liability to costs. The real question argued by the plaintiff is as to the validity of the warrant. He asserts that it is an illegal warrant, making the defendant liable for the act of Robinson. The order is founded on s. 116 of the earlier County Courts Act, 1846, and may be enforced "by such ways and means" as are therein provided for enforcing a judgment recovered in the said Court. What are those "ways and means"? We turn to s. 94, which enacts "that whenever the judge shall have made an order for the payment of money, the amount shall be recoverable in case of default . . . by execution against the goods and chattels of the party against whom such order shall be made; and the clerk of the Court, at the request of the party" (where there is one) "possessing such order, shall issue, under the seal of the court, a writ of fieri facias as a warrant of execution to the high bailiff of the Court." That clause would be inapplicable where the defendant himself is high bailiff, but nevertheless the former part prescribing that the recovery is to be by execution is equally operative in the case of a high bailiff as in the case of an ordinary person. The latter part of s. 78 proceeds to enact that "in any case not expressly provided for herein or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied at the discretion of the judges" of the county courts "to actions and proceedings in their several courts." Now, if the attention of the judges of the superior court had been called to this case, they would, I think, have made a very reasonable rule that another officer should be appointed by the Court to execute process against one in the position of high bailiff, to whom ordinary process could not go. And that is exactly what has been done in this case, which was one of such rarity that the ordinary rules of the county court did not meet it. Perhaps it may have been unfortunate that the person appointed by the registrar came, in one sense, within the terms of s. 22 of 30 & 31 Vict. c. 142, for this section only shews that the registrar may

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appoint where he has permanently assumed the function of high bailiff.

AMPHELT, B. I am of the same opinion. On the question as to the order for costs, the principal objection raised by the counsel for the plaintiff was that the mind of the learned judge had never been directed to the amount of these costs. The judge appears to have ordered the costs to be taxed by the registrar, and the amount of those costs was inserted in the order. When I recollected the mode in which judgments of the superior Courts are carried out, I was surprised to find any such objection. Here, in this court, judgment is given for the plaintiff or defendant, with costs to be taxed by the proper officer, and the minds of the judges are never directed to the amount unless some special objection is made. I think the order was regular, and if any objection could be made to the amount of costs assessed by the registrar, the proper course was to apply to the judge. And it appears that that very course was adopted by the plaintiff, who applied by way of summons, to the judge to review taxation, but did not proceed further. It was not afterwards in his power to object to the order for irregularity in respect of costs.

The main question, however, is as to the subsequent proceedings to enforce the order. The chief objection was that the warrant was intrusted for execution to a bailiff not properly appointed. It was suggested that the high bailiff himself should execute the process, which would involve almost an absurdity. Then it was said that the high bailiff could have been dismissed and another appointed, to whom the warrant might be directed. Dismissal, however, might be too severe a punishment for the high bailiff, and, moreover, it seems that the judge had no power to dismiss him, and that the power belonged only to the Lord Chancellor, who might require a long time to investigate the offences before acting upon them, and so the object of the warrant might be defeated; or, indeed, the Lord Chancellor might think it not a case for dismissal.

Then it was argued that the order might have been executed by the under bailiffs, but we must remember that they might be

dismissed by the high bailiff at a moment's notice, and therefore, when an under bailiff came to levy the fi. fa., the high bailiff might on the instant dismiss him from his office. So the registrar consulted the judge of the county court, who agreed that the best course to be taken would be to proceed under s. 22 of 30 & 31 Vict. c. 142, and for the registrar to appoint some stranger to execute the writ. Having looked at that section, I think that the provisions of the statute, taken altogether, evidently refer to a bailiff appointed by the registrar in those cases where the registrar and not the high bailiff has to appoint the under bailiff; so I do not think the appointment under s. 22 was a good appointment.

The next question is, whether there is necessarily a power in the judge of the county court to appoint a bailiff ad hoc. I think that he undoubtedly had that power, and should have thought that, on general principles, justified by the old authorities and year books cited, there was a clear necessary power incident to a Court to enforce its process. The moment it is found that there was a valid order made by the judge, it appears to me that he had an inherent power to appoint any other person whom he might think fit to enforce it. But the matter does not rest there, for under s. 78 of the 9 & 10 Vict. c. 95, it is enacted [the learned baron read the section]. What are the general principles of the superior Courts which are applicable here? There is a familiar case as to which the course to be taken is prescribed in the books. When the sheriff himself is a defendant, the coroners are appointed to execute process against him, and if they also are interested, a person called an "elisor," or even two elisors, may be appointed for that purpose. So here, the registrar thinking no doubt that he had power to appoint under 30 & 31 Vict. c. 142, s. 22—but whether he was right or wrong in that supposition, to my mind, matters not—ordered the warrant to be addressed to Robinson and others. I think it quite immaterial that the registrar was wrong in supposing he had power to appoint under s. 22, for I am of opinion that he had a general power of appointing any person to whom, in his discretion, he thought right to address the warrant, and that the warrant itself, being addressed to Robinson, would of itself be a sufficient appointment

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to him under the circumstances. I will only add that I think it is necessary to look into the validity of the warrant, because in the form in which the question is put to us I do not think we are at liberty to draw any distinction between the defendant and Robinson, and it was intended that the defendant should be liable if Robinson was not justified, so as to obviate another action being brought.

*Judgment for the defendant.*

Attorneys for plaintiff: *Stevens & Co.*

Attorneys for defendant: *Clarke, Son, & Rawlins.*

*June 2.*

SANDERSON AND ANOTHER v. GRAVES.

*Statute of Frauds (29 Car. 2, c. 3), s. 4—Variation by Parol of Terms of Written Contract—Executory Agreement.*

The plaintiffs entered into an agreement in writing with the defendant, to let him a public-house as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years, upon the terms, amongst others, that if he sold such lease for more than 1200*l.* he should give the plaintiffs half the difference. The plaintiffs having granted him a lease of the house, which he sold for 2500*l.*, brought an action against him upon the agreement to recover one-half of 1300*l.* The defendant contended that the lease to him was granted under a substituted agreement, which was not in writing so as to satisfy the Statute of Frauds. The lease granted differed from that specified in the written agreement in the following particulars: The term was for thirty-two years, instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1200*l.* There was also no covenant against assignment without the lessor's consent, nor one binding the lessee to take his beer from the plaintiffs, as in the original agreement. These differences were the result of objections by the defendant, yielded to by the plaintiffs, who on their part required the additional rent. The jury found, however, that the stipulation as to dividing the profit remained in force or was renewed:—

*Held*, that the defendant was entitled to judgment, as there was a new agreement, which ought to have been in writing to satisfy the Statute of Frauds.

*Semble*, per Amplett, B., that if there had been anything in writing to shew that the lease granted was accepted in substitution for that originally stipulated for, the action might have been maintained.

DECLARATION, first count: That by agreement dated the 4th of October, 1871, it was agreed between the plaintiffs and defendant that the plaintiffs should let the defendant a public house

called the Rose and Crown, for the term of one year from the 29th of September then last past, and so on from year to year with a proviso, that upon receipt of three months' notice requiring them so to do, and upon payment of 1200*l.* the plaintiffs should execute to the defendant a lease of the premises for twenty-eight years, at the rent of 100*l.* a year, and that in case the defendant should at any time after the lease dispose of the business on the premises for a larger sum than 1200*l.* the surplus should be divided into two parts, and one part paid to the plaintiffs, subject to a deduction for previous expenses incurred by the defendant in substantial alterations and repairs of the premises, and that in case the business were so sold, the plaintiffs should accept a surrender of the lease and grant a new lease to the purchaser. Averment of conditions precedent, and that premises were sold for 2500*l.* Breach, non-payment of 650*l.* There were other similar counts, and the common count for money had and received.

First plea, denial of agreement. Fifth plea, rescission of agreement. Nineteenth, to common count, never indebted.

Joinder of issue.

At the trial before Pigott, B. at the Middlesex sittings, after Trinity Term, 1874, there was a verdict for the plaintiffs for 650*l.*, with leave for the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,

Jan. 16. Before Bramwell, Pigott, and Amphlett, B.B.:

*Henry Matthews, Q.C.*, and *R. V. Williams*, shewed cause and cited *Smith v. Trowsdale* (1); *Hoadly v. McLaine* (2); *Souch v. Strawbridge* (3); *Harvey v. Grabham* (4); Benjamin on the Contract of Sale, 2nd ed. p. 151.

*Sir J. Holker, S.G.*, and *A. Collins*, in support of the rule, cited *Goss v. Lord Nugent* (5); *Marshall v. Lynn* (6); *Cocking v. Ward* (7); *Noble v. Ward*. (8)

(1) 3 E. & B. 83; 23 L. J. (Q.B.) 107.

(2) 10 Bing. 482.

(3) 2 C. B. 808, per Tindal, C.J. at p. 814; 15 L. J. (C.P.) 170.

(4) 5 A. & E. 61.

(5) 5 B. & Ad. 58.

(6) 6 M. & W. 109.

(7) 1 C. B. 858; 15 L. J. (C.P.) 245.

(8) Law Rep. 2 Ex. 135.

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The facts and arguments in this case sufficiently appear in the judgments of Bramwell and Amphlett, BB.

*Cur. adv. vult.*

June 2. The following judgments were now read :—

BRAMWELL, B. In this case, the plaintiffs entered into an agreement in writing with the defendant to let him a public-house, as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years on the terms, among others, that if he sold such lease for more than 1200*l.*, he should give the plaintiffs half the difference. The plaintiffs have granted him a lease of the house, he has sold it for 2500*l.*, and the plaintiffs claim of him half the difference between the two sums, i.e. half 1300*l.* The defendant denies their right to this on the ground that the lease was not granted under the agreement above mentioned, but under a new one, which not being in writing cannot be enforced. The lease granted differed from that agreed to be granted in the following particulars. It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1200*l.* There was no covenant, as had been agreed, against assignment without the lessor's consent, nor binding the lessee to take his beer of the plaintiffs. Some other restrictive covenants agreed for were omitted. These differences between the lease mentioned in the agreement, and that granted were the result of complaint and objections by the defendant yielded to by the plaintiffs, who on the other hand, required the additional rent. The jury, however, have found, and it must be taken, that the stipulation as to dividing the surplus over 1200*l.* remained in force or was renewed, and consequently, but for the Statute of Frauds, the defendant would be bound by it.

The defendant contends that there is a new agreement, and that as it relates to an interest in land and is not in writing, it cannot be enforced. The plaintiffs say that there is no new agreement, but a substituted performance. As this performance, however, could only be substituted for the other by the agreement of the two parties, the plaintiffs and defendant, it seems to me manifest there was a new agreement, and not a new agreement as to part,

but a new agreement as to the whole. The old agreement was entirely gone, and a new agreement arose incorporating such parts of the old agreement as the parties did not choose to alter. There are not two agreements here, one made at the time of the original agreement, the other at the time when the terms were changed; nor is it one agreement, made part at one time, part at another. The rule of law is that all things to be performed by a party to an agreement on his part are the consideration for all to be performed by the other party. Let us borrow an illustration from the old style of pleading. Mutual promises would have been averred. What? Why, that it was agreed plaintiffs should grant and defendant take a lease for thirty-two years at 105*l.* and so on, and then each, in consideration of the other's promise, promised performance. From what time would the Statute of Limitations have run in an action for not granting the thirty-two years' lease? Surely from the time it was agreed that it should be granted. Suppose the agreement had then been reduced to writing, it would have contained the old terms which remained, and the new ones. This is the reason of the thing. But *Goss v. Lord Nugent* (1) is in point as an authority: Parke, J. says, "Here there has not been a waiver of the entire agreement, but a part of it only, and the effect of that waiver is to substitute for the original contract a new one," and see his comment in *Cuff v. Penn.* (2) In the judgment in *Goss v. Lord Nugent* (1) it is said, "the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement and partly by the new verbal agreement. See also *Marshall v. Lynn* (3), and *Harvey v. Grabham*. (4) It is true that in *Hoadley v. McLaine* (5), Mr. Justice Gaselee said that, "unless we establish that every alteration introduced in the progress of an executory contract is to constitute a distinct bargain requiring a distinct note in writing, there is no variance," and added, "If we were to hold otherwise, every building contract could be avoided by every addition." But no other judge put the case on that ground, and the remark may be

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(1) 5 B. &amp; Ad. 58.

(3) 6 M. &amp; W. 109.

(2) 1 M. &amp; S. 21.

(4) 5 A. &amp; E. 61.

(5) 10 Bing. p. 489.



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made that, unless a note in writing is necessary in every case of alteration, it is required in none, so that under the name of alteration, something wholly different might be established. It is observable, that a building contract is not, as such, within the Statute of Frauds, and but for that statute the question cannot arise. There may be a waiver, not in writing, of part performance which is not the whole consideration, but that is not the case here.

It was contended for the plaintiffs, on the authority of a dictum of Tindal, C.J., in *Souch v. Straubridge* (1), that the statute does not apply to executed contracts. But, with all respect, that cannot be true of all cases within s. 4. For, as to some of them, the question cannot arise till the contract is executed, e.g., cases of guarantee, cases in consideration of marriage. There are cases where, when the thing is executed, a defendant might be liable, e.g., on a contract to paint and deliver a picture on and not before a day distant more than a year. If at the time appointed the person ordering the picture took it, he would be held to have renewed his promise at the moment. So of any other case where the law would imply a promise on the doing of anything by the promisor. But the law implies no such promise as that relied on here on the granting of a lease. It is said this is hard and grossly unjust. No doubt the Statute of Frauds always is, in cases where the consideration is executed, as in cases of guarantees, for example, and often where the consideration is executory, but the hardship must be borne for the sake of the rule. Next, it is said that it is of continual occurrence in sales of property that some alteration is made, one piece of land substituted for another, and if that which is contended here is right, such arrangements could not be enforced. I agree they could not. It is quite certain that neither party could have enforced against the other the taking or granting of this thirty-two years' lease. It is granted on the terms contained in it. No collateral agreement in relation to it not in writing can be enforced. I am of opinion our judgment must be for the defendant.

I am glad to say that this opinion had the sanction of my lamented Brother Pigott.

(1) 2 C. B. at p. 814; 15 L. J. (C.P.) 170.

AMPHLETT, B. In this case the plaintiffs, M. & G. Sanderson, being brewers and owners of a public-house, called the Rose and Crown, at Hackney, entered into an agreement in writing with the defendant, dated the 4th of October, 1871, for letting the said public-house to him as yearly tenant, at the rent of 160*l.* per annum, and subject to the several covenants and agreements specified in the articles numbered from one to thirteen, both inclusive; and by the twelfth article the defendant might, by giving three months' notice, and upon payment of 1200*l.*, require a lease of the said premises for the term of twenty-eight years, at a rent of 100*l.*, and subject to similar covenants as in the said agreement contained, or such of them as might be applicable to a lease of the said premises, and such others as are usually inserted in leases of public houses; and by the thirteenth article, it was agreed that in case the said tenant should at any time after the granting of the said lease sell the business for a larger sum than 1200*l.*, the excess should be divided equally between the plaintiffs and defendant. The public-house was subsequently burnt down, and by means of moneys received from the insurance office, and, as I collect, some additional moneys found by the defendant, the house was rebuilt, and after some negotiation it was arranged, and almost entirely at the request and for the benefit of the defendant, that a lease should be granted by the plaintiffs to the defendant, but that the terms should be varied from those stipulated for in number twelve in the following particulars:—

1. 800*l.* only was to be actually paid on the granting of the lease, but in consideration of other moneys which had been expended over the premises by the defendant, 1200*l.* was still to be expressed as the price paid on the granting of the lease.

2. The term was to be for thirty-two years, at a rent of 105*l.*, instead of twenty-eight years, at a rent of 100*l.* per annum.

3. Several covenants burdensome to the defendant were to be omitted.

A lease with these variations, dated the 4th of April, 1873, was accordingly granted by the plaintiffs to the defendant, and the counterpart was duly executed and signed by the defendant.

The defendant afterwards sold the premises for the sum of

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2500*l.*, exceeding the 1200*l.* by 1300*l.*, and the plaintiffs therefore claimed to be paid one moiety of such excess under the said thirteenth article, and the defendant refusing to admit the said claim, this action was brought to enforce it.

The defendant's defence at the trial was that the lease was granted in pursuance of a new parol agreement, and was not granted or accepted in lieu or satisfaction of the twelfth clause of the written agreement.

The jury found a verdict for the plaintiffs, and the defendant having obtained a rule to shew cause why that verdict should not be set aside, and a nonsuit or a verdict for the defendant should not be entered, or why a new trial should not be had, the same has been argued before us and has now to be decided.

Now, having regard to the way the question was left to them by Pigott, B., I think that the jury, in finding a verdict for the plaintiffs, must be taken to have found, so far as respects the intentions of the parties, that there was no abandonment or super-session of the written agreement, except so far as the lease granted varies from the lease stipulated for in the twelfth article. It was, however, contended before us, on the part of the defendant, that, whatever may have been the intention of the parties, the new lease, varying as it did from the terms agreed upon by the written agreement, put an end entirely to such written agreement, and that to insist now upon the thirteenth article was, in point of fact, to insist upon a new parol agreement upon the old terms, which could not be allowed consistently with s. 4 of the Statute of Frauds. And this argument was, as I understand, merely based upon the principle that when there are two distinct things agreed in writing to be done, each forming the consideration for the other, and one is actually carried into effect with variations verbally agreed upon, the other is in all cases reduced to a mere parol agreement incapable of being enforced. I must confess I cannot agree to that proposition in the broad sense in which it is expressed, for supposing the varied part of the agreement was carried into effect by an instrument in writing, shewing on the face of it that it was a mere substitution for the original, I cannot see anything in the statute to prevent the other part of the

agreement which is evidenced in writing being enforced. Nor is there anything contrary to this decided in the cases cited for the defendant of *Goss v. Lord Nugent* (1), *Marshall v. Lynn* (2), and *Harvey v. Grabham*. (3)

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All that those cases decided was that where an agreement required by the statute to be in writing was varied by parol the Court could not enforce the contract so varied.

This, it appears to me, is a very different proposition from the one we are discussing, where the varied part of the agreement was actually executed.

If, therefore, I had found in the present case, either by a recital or other internal evidence in the new lease itself (which it must be remembered was signed by both parties), or by other written evidence under the hands of the parties, that such lease was intended only to be a substitution for the lease mentioned in the twelfth article, I should have thought that without a violation of the statute the thirteenth article could have been enforced even in a court of law. And I must confess that I have had considerable doubt whether the general similarity of the provisions in the two documents, taken in connection with the surrounding circumstances, is not sufficient to establish the substitution without the aid of parol evidence as to the intention of the parties; but, after mature consideration, I have come to the conclusion that it is not, and must, therefore, agree with my learned Brother Bramwell, that the thirteenth article cannot be enforced in a court of law, which is not yet enabled to act upon the beneficial doctrine of courts of equity in respect of part performance. The result is that the defendant will be able, as far as this Court is concerned, to hold his lease without paying what, on the finding of the jury, must be taken to be a part at least of the agreed consideration.

The plaintiff also contended that the Statute of Frauds did not apply to executed contracts, although executed on one side only, and there are some old dicta, and even decisions, that appear to bear out that view, and had it been sustained, Courts of law would have certainly made a long stride towards the adoption of the

(1) 5 B. &amp; Ad. 58.

(2) 6 M. &amp; W. 109.

(3) 5 A. &amp; E. 61.



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equitable doctrine of part performance. I think, however, that in the face of more modern decisions, such as *Cocking v. Ward* (1) and others, the older authorities on this point must be considered as overruled.

I agree, therefore, that the rule must be made absolute.

*Rule absolute.*

Attorneys for plaintiffs: *Ingle, Cooper, & Holmes.*

Attorney for defendant: *H. S. Willett.*

June 23;  
July 7.

LEHAIN v. PHILPOTT.

*Landlord and Tenant—Distress for Rent—Action for Rent barred, where  
Distress held but unsold.*

When a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it be insufficient to satisfy the rent.

*Lear v. Edmonds* (1 B. & Ald. 157) commented on.

DECLARATION for use and occupation of messuages.

Pleas, 1, never indebted; 2, Payment; 4, That the use and occupation of the messuages and premises were under a demise thereof to the defendant made by the plaintiff, whereby the defendant became indebted to the plaintiff for certain arrears of the rent thereof, and that afterwards and before suit the plaintiff took, levied, and distrained certain goods and chattels of the defendant then in and upon the demised premises, under colour and as and in the name of a distress for the arrears, which goods and chattels then and afterwards were and are of more than sufficient value to have satisfied the arrears and the costs and charges of and attending such distress, and the sale of the goods and chattels thereunder and incidental thereto, and the whole of the causes of action herein pleaded to; and the plaintiff still holds, keeps possession of, and detains the goods and chattels under the levy, and as such distress, for the arrears and not otherwise.

(1) 1 C. B. 858; 15 L. J. (C.P.) 245.

The 3rd plea was similar to the 4th down to the end of the words, "the whole of the causes of action herein pleaded to;" it then concluded with, "and the same thereby then became and were and are satisfied and discharged by such distress," without alleging that the plaintiff still held the distress, as in the 4th plea.

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#### Issue on all the pleas.

At the trial before Pigott, B., at the Guildhall sittings in February, 1875, the following facts were proved:—By a written agreement dated the 30th of March, 1874, the plaintiff let to the defendant a shop in Southampton Street, Strand, for one year from Lady Day, 1874, for 60*l.*, the rent to be paid in twelve equal instalments, namely, 5*l.* on the 25th day of each succeeding month. The defendant entered and occupied and paid the plaintiff 5*l.* for the first month's rent. About the 19th of August the plaintiff distrained for 15*l.* in respect of the three months' rent overdue, had the goods appraised, and retained them until the trial, without having sold them. On the 9th of September he issued a writ and brought this action to recover 20*l.* for the four months' rent due on the 25th of May, 25th of June, 25th of July, and 25th of August respectively. The jury found upon the evidence that there was an eviction by the plaintiff in August and before the 25th: and that the goods distrained and held as a distress were worth 8*l.* Pigott, B., thereupon entered the verdict for the plaintiff for 15*l.* for the three months' rent.

A rule nisi having been obtained for "a new trial on the ground that the plaintiff was not entitled to bring an action for his rent whilst he held a distress for the same rent,"

June 23. *Anstie*, for the plaintiff, shewed cause. The question arises on the 4th plea, and is, whether, when a landlord distrains for rent and holds the distress without selling it, and it is proved that the distress is insufficient to satisfy the rent and costs of distress, he is barred from bringing an action for the rent. *Lear v. Edmonds* (1) is a decision that he is not barred even though the distress be sufficient, provided the rent be not in fact satisfied;

(1) 1 B. & Ald. 157.

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for there the demurrer admitted the truth of the statement in the plea that the distress was sufficient. The present case is stronger for the landlord, for it was found by the jury not only that the rent was not satisfied, but that the distress was worth only 8*l.*, the rent being 15*l.* Bayley, J., there says, "The language of the statute 2 Wm. & M. sess. 1, c. 5, is that the person distraining *may* sell the goods, not that he *must*; if so, then does he not stand as he did at common law before the statute? for it is not averred that the goods distrained were sold." It cannot be that merely detaining the distress without satisfaction is a bar to an action for the rent; for if so the right of action is gone for ever, according to the old rule that a right of action once suspended is for ever lost. There is no reason why the landlord should not have both remedies, just as a mortgagee or pawnee has: *Lockhart v. Hardy*. (1)

*Bovell*, for the defendant, supported the rule, and discussed the authorities which are cited in the judgment. He also referred to *Williams v. Price* (2); *Smith v. Ashforth* (3); *Quin v. Wallace*. (4) He also contended that in 2 Wm. & M. sess. 1, c. 5, s. 2, the words "it shall and may be lawful to sell," mean that the landlord must sell, and cited *Piggott v. Birtles* (5), per Parke B.; *Reg. v. Mayor of Harwich* (6); and the notes to *Simpson v. Harropp*. (7)

*Cur. adv. vult.*

July 7. The judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) was delivered by

CLEASBY, B. In this case, to a declaration for use and occupation, there was a plea that the occupation was under a demise at a fixed rent, and that the plaintiff had taken a distress for the rent sued for of sufficient value to satisfy the rent, and that he still held the distress at the time when the action was brought. There was no demurrer to this plea, but issue was joined upon it, and the case went down to trial, and the jury found the rest of the plea

(1) 9 Beav. 349.

(2) 3 B. & Ad. 695.

(3) 29 L. J. (N.S.) Ex. 259.

(4) 6 Wharton's Pennsylvania Rep. 452.

(5) 1 M. & W. 441, 448.

(6) 8 A. & E. 919.

(7) 1 Sm. L. C. 385, 6th Ed.

proved, but that the distress taken was not of sufficient value to satisfy the rent. The verdict was entered for the plaintiff, but a rule was obtained for the defendant to set aside the verdict, and for a new trial on the ground that the value of the distress was an immaterial part of the plea, and that the plea was a good answer without incorporating the sufficiency of the distress.

The case was very well argued for the plaintiff by Mr. Bovell, before my Brothers Bramwell, Pollock, and myself. The first question is whether the plea, as it stood, was a good plea, because, although there was no demurrer to it, if the whole plea was no answer, then every averment was equally material, and it must be proved as alleged.

Upon the question whether levying distress for rent took away or suspended the right to maintain a personal action to recover it while the distress continued, we were referred to many authorities.

In the case of cattle taken damage feasant, and impounded and detained as a distress, the authorities clearly establish that no action of trespass is maintainable so long as the distress is detained or not accounted for. This was determined after full argument, in very clear judgments from Holt, C.J., and the other judges in *Vaspor v. Edwards*. (1)

This has never been dissented from, and the reason of the conclusion is that when the law gives a man two remedies, one by a sort of execution by levying a distress, and the other by a personal action, he cannot, if he chooses to resort to the former, have his action as long as the distress is in force. It seems to have been considered in early times that when a man adopted his remedy by distress which the law gave him, he made an election, and could not afterwards have his personal action at all; and Turton, J., in the beginning of his judgment in the case referred to, says, "The plaintiff had his election of two remedies, trespass or distress, and using of one is an utter waiver of the other;" and Littleton (2), ss. 219, agrees with this. But this doctrine of election, founded originally upon some distinction between a real remedy and a personal one is, I should say, obsolete, and all the late

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(1) 12 Mod. 658, also reported sub nomine *Jasper v. Eadowes*, 11 Mod. 21; and in 1 Ld. Raym. 719; 1 Salk. 248.

(2) Littleton's Tenures by Cary, B. 1. s. 219, referring to a grantee of a rent-charge.



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authorities take no notice of it, though it would have been conclusive if effectual. The question in that case was as follows:— Action of “trespass quare clausum fregit, and fed his grass with a pig.” Plea, that the plaintiff had distrained the pig damage feasant and impounded it. Replication, that the pig escaped without the consent of the plaintiff. Held, ill, for not alleging that it was without the default of the plaintiff. This is therefore a clear authority that the distress is an answer to the act of trespass till it is ended without the plaintiff’s default. The analogy between the case of distress taken damage feasant and distress for rent is obvious. At common law each was only a pledge; the distress for rent is more a voluntary act than the distress damage feasant, because in the latter case the man may be said to be acting on the compulsion of the trespass.

There are certainly good reasons for holding that a man who has distrained for rent shall not have his action until the result of the distress is ascertained; for by taking the distress he compels the tenant either to lose his goods (or before the statute 2 Wm. & M. sess. 1, c. 5, the use of them), or replevy. Now if in order to preserve his goods he replevies, he must give a bond to prosecute his suit with effect, and he must bring his action, and then the avowry and plea raise the question of the right to the rent in the same way as the action of covenant. It is therefore reasonable to say that the landlord who has compelled the tenant to bring his action to try the right to the rent shall not have his own action until the former is disposed of. And the authorities (although there are some late ones apparently to the contrary) are clear upon the subject.

We were referred to the Year Books, and we have the early entries of Rastell, for the question must then have frequently occurred. They are in p. 176a; it is only necessary to refer to one, placitum 8. After another plea, it proceeds, as regards a claim for rent, that the plaintiff ought not to have his action, because he seized divers goods and chattels as a distress for the rent, and still detains the same. The replication is merely a traverse of the fact that he made the seizure in question as a distress. Thus the distress, while detained, was certainly considered a good answer then. And accordingly, in the case of *Vaspor v. Edwards* (1), already referred

to, where the effect of a distress taken damage feasant which had escaped was considered, it seems to have been thought clear that in the case of a distress for rent it was an answer to the declaration.

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In that case the judgment was given after great consideration; and Gould, J., says: "For the party has the goods as a pledge, and as long as that continues he shall not have any other remedy; but once it ceases to be a pledge, his action is restored to him;" and further on, "The plea is bad; it is that nomine districtionis he took and impounded; but that is not enough, for he should have said further that he still does detain the distress." He afterwards, referring to the entry in Rastell, p. 175, says, "Where a distress for rent is so pleaded and shewed to continue, so here as long as it is shewed that the plaintiff has a gage or pledge, so long it is a bar." Powis, J., says, "If the cattle die in pound, he may distrain in case of rent, or bring debt; ergo, if they die in case of damage feasant he may bring trespass."

Turton, J., also considers the case of distress for rent clear, and refers to it as an argument. He says: "And distress sufficient to satisfy the rent is a good plea in bar to debt for the rent; so, by parity of reason, in trespass." Holt, C.J., in his judgment, does not refer to the case of rent; but in the case of *Alton v. Jarvis* (1), he says: "'Distraining' is 'levying.' If a man distrain for rent and impound the distress, and then bring debt for the same rent, the defendant may plead 'levied by distress.'" This is not the matter decided, but put as clear, and is given in Viner's Abr. Debt (I. 2), s. 8.

To come to later authorities, the effect of a distress for rent came before the Court of Queen's Bench in the case of *Edwards v. Kelly*. (2) The real question in that case was whether a promise to pay the rent by a stranger upon the withdrawal of the distress was a promise to be answerable for the debt of another, and so the question becomes whether the debt for the rent still continued while the distress was in force; and upon that Bayley, J., says: "After the plaintiff had distrained he held in his own hands his remedy for recovering the rent, and the tenant was at that time

(1) 11 Mod. 144.

(2) 6 M. &amp; S. 204.

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no longer indebted, for so long as the landlord held the goods under distress, the debt due from the tenant was suspended." And Holroyd, J., a most careful and accurate judge, says: "If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer, which shews that the debt was for the time suspended." He thinks it clear that the distress would be an answer, and draws the conclusion from it.

The above reasons and authorities seem to establish clearly that the existence of the distress is an answer to an action for the rent. In the case last referred to it appeared, no doubt, that the distress was of sufficient value to satisfy the rent, but all the authorities proceed upon the general principle that the taking and holding of the pledge takes away the right to bring the action, without reference to the value. The dictum of Turtton, J., is the only authority which makes the value of the distress the test. The value of the distress must be a matter quite uncertain; and if, being supposed to be of sufficient value, it suspends the remedy for rent altogether, it would be most unreasonable to say that, as it is the act of the landlord who chooses to distrain certain articles, the doing so; provided they should be of insufficient value, leaves the remedy by action open for the whole rent. And if not for the whole rent, then it is impossible to say for what part. As long as the distress remains, the tenant cannot tell what amount to pay into Court to satisfy the uncertain balance. It certainly seems more reasonable to say, in accordance with the precedents and current of authorities, that the levying the distress for the whole rent suspends the remedy for the whole rent as long as the distress continues a pledge. If the goods were insufficient to meet the whole arrears, the landlord might have distrained in respect of one month's rent, and have proceeded by action for the residue.

We have now only to deal with some late authorities which appear to be at variance with the conclusion arrived at, but which I think are not really so.

The distinction is this, that in these cases the plea only alleged that the landlord took and detained, and did not go on to say that he still, at the commencement of the action, continued to detain.

The first case relied upon was that of *Lear v. Edmonds* (1), decided in the same year and by the same judges as *Edwards v. Kelly*. (2) In that case the plea was that the plaintiff took and detained the goods as a distress, the same form as in *Vaspor v. Edwards* (3), which was then held bad. It does not shew that the pledge or levy continued in force at the commencement of the action. The ground of decision is not quite clear; it rather appears to be that the mere seizure was not satisfaction, and the defendant had alleged nothing more, as he ought to have done, the facts being in his knowledge.

But the case is also reported in 2 Chitty's R. p. 301, under the name of *Deare v. Edmunds*, and there the reasons appear. Bayley, J., in the course of the arguments, says: "it does not appear how long the distress was detained;" and Abbott, J., says: "The mere statement of the taking of a distress without saying how long the same was detained, is not a satisfaction;" and Bayley, J., in his judgment, puts it on the ground that the plea does not go far enough in not accounting for the distress.

So that this case, which was the principal one relied on in the argument, is really no authority whatever that the action could be brought while the distress was in the hands of the landlord.

This case was followed and acted upon in two subsequent cases, *Lingham v. Warren* (4), and *Hudd v. Ravenor* (5), but in those cases the only decision was that the taking of a distress, though of a sufficient value, was not of itself a satisfaction.

It is worthy of notice that all these authorities were brought under the notice of the Court of Common Pleas in the case of *Dawson v. Cropp*. (6) The question there was very much one of pleading, but a substantial question was involved, whether, after a distress for rent had been made, another distress could lawfully be made for the same rent while the first was not accounted for—a similar question to the present one, though not the same—and it was held that it could not. In an elaborate considered judgment Tindal, C.J., says, p. 971: "Assuming that the rent remained due,

(1) 1 B. &amp; Ald. 157.

(2) 6 M. &amp; S. 204.

(3) 12 Mod. 658.

(4) 2 B. &amp; B. 36.

(5) 2 B. &amp; B. 662.

(6) 1 C. B. 961.



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not having been satisfied by the first distress (and the case of *Lear v. Edmonds* certainly did not go beyond that), still the landlord could not make a second distress." This shews that the case of *Lear v. Edmonds* was only considered as deciding that a distress is not of itself a satisfaction of the rent, which is not disputed.

I only desire further to refer to the case of *Rex v. Cotton* (1), where the question was, whether goods taken as a distress for rent could afterwards be seized for the king's debt before sale, and the general nature and effect of a distress is fully gone into in a most ably considered judgment of Parker, C.B. In the course of the judgment (2) he says, it was argued, "secondly, that levying by distress was a good bar, and 1 Salk. 248, was cited; to which I answer, that it is agreed in that case that if the distress dies in the pound, or escapes without default of distrainer, he may distrain again; and so he may distrain de novo where the distress legally evicted without his default; for *levying* distress is only a temporary bar, and no satisfaction."

For the above reasons I am of opinion that the plea was a good plea, because as long as the distress continued the action of debt could not be brought; and that if the distress was held, it was immaterial what was its value, and could not properly be decided, and therefore enough of the plea was proved to make a defence; and so the rule must be made absolute.

My Brothers Bramwell and Pollock concur in this judgment.

*Rule absolute.*

Attorneys for plaintiff: *John C. Button & Co.*

Attorney for defendant: *A. A. L. Harrison.*

(1) 2 Ves. Sen. 287.

(2) 2 Ves. Sen. at p. 295.

## LUCAS v. MASON.

1875

July 7.

*Master and Servant—Liability for Trespass—Chairman at Public Meeting—  
Order to remove Person making Disturbance.*

On the trial, in an action for assault, the plaintiff proved that he was present in the gallery of a large hall where there was a meeting convened by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to shew the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by the defendant, before the act complained of:—

*Held*, that there was no evidence to go to the jury of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorize the officers to act upon their judgment as to who were the persons making the disturbance.

ACTION for assault. Plea, not guilty. Joinder of issue.

At the trial before Pollock, B., at the Manchester spring assizes, 1875, the learned Baron nonsuited the plaintiff. A rule nisi to set aside the nonsuit having been obtained,

June, 24, 25. *Edwards, Q.C.*, (*Pope, Q.C.*, with him), shewed cause.

*Torr, Q.C.*, and *R. H. Collins*, supported the rule.

*Cur. adv. vult.*

The facts and arguments sufficiently appear in the judgment.

July 7. The judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) was delivered by

POLLOCK, B. The plaintiff in this case by his declaration alleged that the defendant assaulted and injured him, to which the only plea material to the question now before us is not guilty.

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The cause was heard before Pollock, B., at the last Manchester assizes, when the plaintiff, being called as a witness, proved that he was present in the gallery of a large hall where there was a meeting convened by members of the Church Liberation Association, and the defendant acted as chairman.

In the course of one of the speeches there was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance. The plaintiff stated that, upon this, a man with a white ribbon in his coat and two policemen seized him and dragged him over some benches to the front part of the gallery, whereby he was bruised and injured. Counsel for the defendant submitted that there was no evidence which ought to be left to the jury of the liability of the defendant for the acts of those who so seized the plaintiff, and the learned judge being of that opinion, nonsuited the plaintiff.

It was not shewn at the trial what was the position or duty with relation to the meeting in question, either of the man with the white ribbon or of the two policemen, nor that any instructions had been given to them by the defendant, or any one else, before the act complained of, as to keeping order or otherwise. We think, however, it must be assumed that the man with the white ribbon was in the position of a steward, whose duty it would be to assist the chairman in keeping order should any disturbance arise. It must also, we think, be assumed that what was done by the man with the white ribbon and the two policemen was done under the honest, though mistaken, belief that the plaintiff was one of those who were making the disturbance. It was not suggested in the argument before us that the defendant had been personally guilty of any wrongful act, or that he had by express instructions authorized, or by subsequent ratification adopted, the wrongful act complained of. If, therefore, any liability attached to the defendant it must be in consequence of the general relationship which existed between the defendant and those who brought the plaintiff forward, or because his order to bring the disturbers to the front, meant, "Determine who are disturbers, and when you have done so, bring

forward those whom you so determine to be disturbers." Under these circumstances it becomes necessary to consider whether there was any evidence to show that the defendant's order had that meaning, or would reasonably be so understood by those to whom he gave it, and whether, upon any principle of law, the defendant could be made liable in this action. Where the trespass complained of is the direct and necessary consequence of an order given for its committal, the person who gives the order is clearly liable for the consequences, as much as if the trespass were done by his own hand; and where the relation of master and servant exists the former is liable for the tortious acts of the latter wherever they are such as come within the scope of the servant's general duty, although in doing the particular act complained of he may have exceeded his authority, provided what he does is in the honest belief that he is executing his master's orders; for in most cases where a duty is to be performed or an act done by a servant, some discretion must be vested in him to whom the doing of it is committed, and, where this is so, the master cannot enjoy the benefit of his servant's acts which involve this discretion without being responsible for their result.

This rule holds especially where the master is absent, and the duty to be performed vicariously is general in character, as in the case of conductors of public vehicles, railway servants, and the like. Thus, in *Seymour v. Greenwood* (1) the Court of Exchequer Chamber held the defendant, who was the owner of an omnibus, liable for the act of his guard in removing a passenger whom he supposed to be drunk, for, as was said by the Court, "The master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself."

In the present case there was no relation of master and servant, or of principal and general agent, or agent for such cases as might occur in the absence of the principal, but a particular direction as to a particular matter, and this, in our judgment, not only prevents the decisions referred to binding us as authorities, but makes them inapplicable in principle. In the case of master and

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(1) 7 H. & N. 355; 30 L. J. (Ex.) 327.



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servant, the character and duties attaching to the employment are known and defined beforehand, the servant who is to perform them is selected accordingly. In the present case no such relationship existed in the first instance, nor did it arise during the transaction. It is no doubt the duty of the chairman of a meeting, where a large body of people are gathered together, to do his best to preserve order, and it is equally the duty of those who are acting as stewards or managers to assist him in so doing, but the nature and extent of this duty on both sides cannot be very closely defined *à priori*, and must necessarily arise out of, and in character and extent depend upon, the events and emergencies which may from time to time arise. There is no such pre-existing relationship as exists in the case of master and servant, and there is, we think, no ground for extending by implication an express authority limited in its terms. The disturbance which gave rise to the defendant's words took place in the presence of those who acted upon them. They were nearer to the plaintiff than was the defendant, and, if in doubt, might have referred to the defendant for further instructions. It does not, therefore, seem to us that there was any evidence which should have been submitted to the jury of a general or implied authority going beyond the limit of that which was created by the express words used, or of any authority to the persons ordered to bring the disturbers forward to exercise a discretion as to who were disturbers. The rule must therefore be discharged.

*Rule discharged.*

Attorneys for plaintiff: *Bower & Cotton, for Gardner & Horner, Manchester.*

Attorneys for defendant: *Johnson & Weatheralls, for G. Hadfield, Jun., Manchester.*

## NICHOLS v. MARSLAND.

1875

June 12.

*Water stored—Water overflowing from Defendant's Land to Plaintiff's Land—  
Floods—Extraordinary Rainfall—Vis Major—Act of God.*

One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for an escape of the water which injures his neighbour, if the escape be caused by an agent beyond his control, such as a storm, which amounts to vis major, or the act of God, in the sense that it is practically, though not physically, impossible to resist it.

On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up with artificial embankments a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell so that the artificial embankments were carried away by the pressure, and the water in the pools, being thus suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, and amounted to vis major:—

*Held*, that the action was not maintainable.

*Rylands v. Fletcher* (Law Rep. 3 H. L. 330) distinguished.

THE plaintiff sued as the surveyor for the county of Chester of bridges repairable at the expense of the county.

The first count of the declaration alleged that the defendant was possessed of lands and of artificial pools constructed thereon for receiving and holding, and wherein were kept, large quantities of water, yet the defendant took so little and such bad care of the pools and the water therein that large quantities of water escaped from the pools and destroyed four county bridges, whereby the inhabitants of the county incurred expense in repairing and rebuilding them.

The second count alleged that the defendant was possessed of large quantities of water collected and contained in three artificial pools of the defendant near to four county bridges, and stated the breach as in the first count.

Plea, not guilty, and issue thereon.

At the trial before Cockburn, C.J., at the Chester Summer Assizes, 1874, the plaintiff's witnesses gave evidence to the following effect:—The defendant occupied a mansion-house and

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grounds at Henbury, in the county of Chester. A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area called "the upper pool," from which it escaped over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the "middle pool," which was between one and two acres in area. Escaping over a weir in the embankment, it was again dammed up into "the lower pool," which was between eight and nine acres in area, and from which the stream escaped into its natural and original course.

About five o'clock p.m. on the 18th of June, 1872, occurred a terrible thunderstorm, accompanied by heavy rain, which continued till about three o'clock a.m. on the 19th. The rainfall was greater and more violent than any within the memory of the witnesses, and swelled the stream both above and in the defendant's grounds. On the morning of the 19th it was found that during the night the violence and volume of the water had carried away the artificial embankments of the three pools, the accumulated water in which, being thus suddenly let loose, had swelled the stream below the pools so that it carried away and destroyed the county bridges mentioned in the declaration. At the pools were paddles for letting off the water, but for several years they had been out of working order.

Some engineers and other witnesses gave evidence that in their opinion the weir in the upper pool was far too small for a pool of that size, and that the mischief happened through the insufficiency of the means for carrying off the water. It was not proved when these ornamental pools were constructed, but it appeared that they had existed before the defendant began to occupy the property, and that no similar accident had ever occurred within the knowledge of the witnesses.

After hearing the address of the defendant's counsel, the jury said they did not wish to hear his witnesses, and that in their opinion the accident was caused by vis major. In answer to Cockburn, J., they found that there was no negligence in the construc-

tion or maintenance of the works, and that the rain was most excessive. Cockburn, C.J., being of opinion that the rainfall, though extraordinary and unprecedented, did not amount to vis major or excuse the defendant from liability, entered the verdict for the plaintiff for 4092*l.*, the agreed amount, reserving leave to the defendant to move to enter it for her if the Court (who were to draw inferences of fact) should be of opinion that the rainfall amounted to vis major and so distinguished the case from *Rylands v. Fletcher*. (1)

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A rule nisi having been accordingly obtained to enter the verdict for the defendant on the ground that there was no proof of liability, the plaintiff on shewing cause to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence—

May 27. *McIntyre, Q.C.*, and *Coxon*, for the plaintiff, shewed cause. The defendant having for her own purposes and advantage stored a dangerous element on her premises, is liable if that element escapes and injures the property of another, even though the escape be caused by an earthquake or any form of vis major.

[CLEASBY, B. Was not the flood brought on to the defendant's land by vis major?]

The pools were made by those through whom the defendant claims, and if there had been no pools the water of the natural stream would have escaped without doing injury. The case falls within the rule laid down by the judgment in *Fletcher v. Rylands* (2), delivered by Blackburn, J.: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of vis major, or the act of God." This passage was cited with approval by Lord Cairns, C., and Lord Cranworth on appeal. (3)

(1) Law Rep. 3 H. L. 330.

(2) Law Rep. 1 Ex. 265, 279.

(3) Law Rep. 3 H. L. 330, 339, 340.



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[CLEASBY, B. There the defendant brought the water on to his own land. Not so here.]

The intimation that vis major would perhaps be an excuse is not confirmed by any decision or any other dictum. But the facts here do not amount to vis major. If the weirs had been larger, or the banks stronger, the mischief would not have happened. Vis major means something which cannot be foreseen or resisted, as an earthquake or an act of the Queen's enemies.

*Hughes and Dunn* (Sir J. Holker, S.G., with them), in support of the rule, cited Broom's Legal Maxims, 5th ed. p. 230: "The act of God signifies in legal phraseology any inevitable accident occurring without the intervention of man, and may indeed be considered to mean something in opposition to the act of man, as storms, tempests, and lightning: per Mansfield, C.J., in *Forward v. Pittard* (1); *Trent Navigation v. Wood* (2); *Rex v. Somerset*. (3)" Also *Amies v. Stevens* (4), *Smith v. Fletcher* (5), *May v. Burdett* (6), and *Jackson v. Smithson*. (7)

[The question of the verdict being against the evidence was then argued.]

*Cur. adv. vult.*

June 12. The judgment of the Court (Kelly, C.B., Bramwell and Cleasby, BB.) was read by

BRAMWELL, B. In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or vis major. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country: yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or vis major. No doubt not the act of God or a vis major in the sense

(1) 1 T. R. at p. 33.

(2) 3 Esp. at p. 131.

(3) 8 T. R. 312.

(4) 1 Str. 127.

(5) Law Rep. 9 Ex. 64.

(6) 9 Q. B. 101.

(7) 15 M. & W. 563.

that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes: in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes: both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbour's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may

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use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

This case differs wholly from *Fletcher v. Rylands*. (1) There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment (2) in *Fletcher v. Rylands*, and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, *Sic utere tuo ut alienum non lædas*, and that the defendant has done, and no more.

The Chief Baron and my Brother Cleasby agree in this judgment. As to the plaintiff's application for a new trial on the ground that the finding of the jury is against evidence, we have spoken to Cockburn, C.J.; he is not dissatisfied therewith, and we cannot see it is wrong. Consequently the rule will be absolute to enter a verdict for the defendant.

*Rule absolute.*

Attorneys for plaintiff: *Philpot & Son, for Potts & Roberts, Chester.*

Attorney for defendant: *E. Byrne, for Brocklehurst & Co., Macclesfield.*

(1) Law Rep. 1 Ex. 265, 279.

(2) 3 H. & C. at p. 788; 34 L. J. (Ex.) at p. 181.

## HOLMES AND WIFE v. MATHER.

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June 24.

*Trespass to the Person—Driving unmanageable Horses in the public Highway—  
Accidental Injury—Vis Major—Master and Servant.*

To maintain an action for injury to the person the injurious act must be wilful or the result of negligence.

The defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving, and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one:—

*Held*, that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act.

*Quære*, whether, if an action would have lain against the servant, it would also have lain against the defendant.

THE first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damnified.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, &c.

Plea, not guilty, and issue thereon.

At the trial before Field, J., at the spring assizes for Durham, 1875, the following facts were proved:—In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses being startled by a dog which suddenly rushed out and barked at them, ran away and became so unmanageable that the groom could not stop them, though he could to some extent guide them. The groom begged the defendant to leave the management to him, and the defendant accordingly



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did not interfere. The groom succeeded in turning the horses safely round several corners, and at last guided them into Spring Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this, and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in any one. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for 50%. on the second count, the Court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

*Herschell, Q.C.*, having obtained a rule nisi to enter the verdict for the plaintiffs for 50%, pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count,

*C. Russell, Q.C.*, and *Crompton*, for the defendant, shewed cause. The plaintiffs' contention is, that the driver gave that direction to the horses which turned them on to the plaintiff; but that is not clear upon the evidence. The horses swerved to the right, and the driver then pulled them further to the right, thinking he could turn them completely round, and so stop them. The horses struck the plaintiff while the driver was trying to pull them away from her. Therefore the injury was not caused by the immediate act of the

driver. The jury having found that there was no negligence, the action is not maintainable in any form. This principle is laid down in the judgment of the Exchequer Chamber, in *Fletcher v. Rylands* (1):—"But it was further said by Martin, B., that when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the foot-path of a public street and kills a passenger: *Hammack v. White* (2); or where a person in a dock is struck by the falling of a bale of cotton which the defendants' servants are lowering: *Scott v. London Dock Co.* (3); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident."

True, there are dicta in *Leame v. Bray* (4) that negligence is immaterial, but there is no such decision. In that case and *M'Laughlin v. Pryor* (5) there was evidence of negligence for the jury. So in *Wakeman v. Robinson* (6), where Dallas, C.J., said: "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie;" and see *Gibbons v. Pepper*. (7) But assuming that the driver is liable in trespass, the defendant took no part in the management of the horses, and

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(1) Law Rep. 1 Ex. 265, 286.

(4) 3 East, 593, 599.

(2) 11 C. B. (N.S.) 588; 31 L. J.

(5) 4 Man. &amp; G. 48.

(C.P.) 129.

(6) 1 Bing. 213, 215.

(3) 3 H. &amp; C. 596; 34 L. J. (Ex.)

(7) 1 Lord Raym. 38.

17, 220.

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was not a participator in the trespass. Assuming, for the sake of argument, that the relation of master and servant existed between the defendant and the groom, the mere presence of the master on the box is not enough to fix him with liability for the trespass of the servant, though it might in an action on the case for negligence. (1) The groom had no implied authority from his master to commit this trespass; the groom expressly took on himself the responsibility of management. Trespass lies where the injury sued for is caused by the immediate and wilful force of the defendant; or by his immediate force without wilfulness. But whether the act of the groom in guiding the horses on to the plaintiff be considered immediate and wilful or not, in no sense was it the immediate force of the defendant, and this is essential in trespass, *Sharrod v. London and North Western Ry. Co.* (2), where Parke, B., delivering the judgment of the Court, said: "When the act is that of the servant in performing his duty to his master, the rule of law we consider to be that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master." There the plaintiff's sheep got upon the defendants' railway through defect of fences, and were run over by a locomotive driven by the defendants' servants. Held, that, whether the facts would or would not support an action on the case, trespass would not lie. *Chandler v. Broughton* (3) is the only case where a defendant has been held liable in trespass in consequence of his mere presence at the time, and there negligence in putting the horse into a gig, was proved, for which he was as much responsible as the driver. In the words of Manley Smith's *Master and Servant*, 2nd ed. p. 209, citing *M'Manus v. Crickett* (4): "Unless there be evidence of the concurrence of the master's will in the act of the servant, a master can in no case be treated as a trespasser for the act of his servant."

(1) See per Bayley, B., in *Moreton v. Hardern*, 4 B. & C. 226, citing *Huggett v. Montgomery*, 2 N. R. 446.

(2) 4 Ex. 580, 586.

(3) 1 C. & M. 29.

(4) 1 East, 106.

*Herschell, Q.C., and Gainsford Bruce*, in support of the rule. But for the act of the groom in directing the horses on to the plaintiff, they would have run into the shop, and the plaintiff would have escaped. The groom may have been doing better for himself and the defendant in avoiding the shop, but that does not justify him in guiding the horse on to the plaintiff. That direction having been given by the immediate act of the driver, an action of trespass lies: *Leame v. Bray*. (1) There the defendant accidentally, and not wilfully, drove his carriage against the plaintiff's carriage, and the question being whether the proper remedy was trespass or case, it was held that the plaintiff had rightly brought trespass. Grose, J., said: "Looking into all the cases from the Year Book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And Lord Ellenborough says: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." This was followed and approved in *McLaughlin v. Pryor*. (2) It is not disputed that the groom was doing all he could to stop the horses, but as he still retained some control over them, the injury was the immediate result of his act. Herein lies the distinction between the present case and *Hammack v. White* (3), where the defendant had no control whatever over the horse, and did all in his power to prevent him going where he did. Here the driver exercised control so far as to pull them away from one direction into another, which took them on to the plaintiff.

[BRAMWELL, B. He was trying to divert them from that direction, but failed. It is not as if he had said, "I must either drive into the shop or on to the plaintiff, and I'll do the latter."]

In *Hammack v. White* (3) there was no count in trespass, and the

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(1) 3 East, 593, 599.

(2) 4 Man. &amp; G. 48.

(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.



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present point was not taken. It only remains, then, to shew that the defendant is as much responsible as if he had himself driven, and this is conclusively established by *Chandler v. Broughton* (1), which was trespass for driving a gig against the church in Langham Place. The defendant was sitting by his servant, who drove, and the horse ran away, and did the mischief. The plaintiff having obtained a verdict, Bayley, B., reserved the point whether the action should have been in case, but a rule nisi to enter a non-suit was afterwards refused. Bayley, B., in giving judgment, said: "The rule is this: if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master. . . . I think that where the master is sitting by the side of his servant, and the servant does an act immediately injurious to the plaintiff, an action of trespass is the proper remedy." This decision and that of *Leame v. Bray* (2) were followed and approved in *M'Laughlin v. Pryor*. (3) There the defendant hired for the day a carriage and horses, which were driven by postillions in the service of the owner of the horses, the defendant sitting on the box. The postillions drove against the plaintiff's gig and injured it: held, that the defendant was liable in trespass, though the postillions were not his servants. It is immaterial that in all these cases there was negligence in the drivers; for, in considering whether trespass will lie, negligence is not regarded. It is not an element in the question of trespass to land—why should it be in trespass to the person? In *Read v. Edwards* (4) it was discussed whether the owner of a dog is not answerable in trespass for every unauthorized entry of the animal on to the land of another; and though the point was left undecided, the only doubt entertained was one arising from the nature of the dog as distinguished from oxen or horses. Willes, J., there referred to a case in the Year Book, 20 Edw. 4, Mich. Term., pl. 10., where the judges held that trespass lay against the defendant, whose beasts having been turned out on an uninclosed place where the defend-

(1) 1 C. &amp; M. 29.

(2) 3 East, 593, 599.

(3) 4 Man. &amp; G. 48.

(4) 17 C. B. (N.S.) 245; 34 L. J. (C.P.) 31.

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ant had common, entered the adjoining land of the plaintiff, and depastured his herbage, without the defendant's knowledge. This case was also cited by Blackburn, J., in *Fletcher v. Rylands*. (1) The defendant by his own volition set the carriage and horses in motion; and if the result is that he can only save himself by injuring the plaintiff, there is no justification for the injury. If somebody must suffer, why should it be the innocent plaintiff, instead of the defendant, who chose to exercise his horses in the public streets?

[BRAMWELL, B., referred to *Mouse's Case*. (2)]

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr. Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the

(1) Law Rep. 1 Ex. 280.

(2) 12 Co. Rep. 63.

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direction of the plaintiff—he drove them there. It is true that he endeavoured to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened.

I think the proper answer is, You cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavouring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother Pollock during the argument is irresistible, that if Mr. Herschell's contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper

remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions. In *Sharrod v. London and North Western Ry. Co.* (1) the master was not present. In *McLaughlin v. Pryor* (2) the defendant was present, and was supposed to be taking part in the control of the animals. In *Leame v. Bray* (3) there was an act of direct force vi et armis, and there was negligence. I think, therefore, that our judgment should be for the defendant.

I think I could distinguish the case cited from the Year Book, but I will only say that there the defendant let out animals, liable to stray, whether frightened or not, in a place not inclosed, and without anybody to keep them in bounds.

CLEASBY, B. I would only add a word as to a point on which my Brother Bramwell has not given judgment, and that is this. This is not a case where the act that is done must be justified, as where a man does a particular thing to avoid something else, but it is a case where it must be shewn that it was the act of the defendant himself. I sum up all in these words: in my opinion, the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all.

I want to say one other word. In my opinion it is not clear that the act was the act of the master. To obtain a true test, we must look at all the circumstances, and particularly at the position of things where persons are placed in a peculiar situation of danger. Here I understand the case to be this: the master not having the same capacity for managing the horses, and being perhaps alarmed and anxious to interfere, the servant says, "Leave it to me, do not take any part." The master complies. That would absolve him as far as any question of personal negligence is concerned; and at that moment I think the act of the servant ceased to be the act of the master. I think, in support of that, I need only read this passage from the judgment of

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(1) 4 Ex. 580.

(2) 4 Man. & G. 48.

(3) 3 East, 593, 599.



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Parke, B., in *Sharrod v. London and North Western Ry. Co.* (1), where he says: "In all cases where a master gives the direction and control over a carriage, or animal, or chattel to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent—no more."

POLLOCK, B. concurred.

*Rule discharged.*

Attorney for plaintiff: *S. R. Hoyle, for Pybus, Newcastle.*

Attorney for defendant: *S. W. Johnson, for Tinley, Adamson, & Adamson, North Shields.*

July 7.

BODDINGTON v. ROBINSON.

*Grant—Freehold Estate to take Effect in futuro—Habendum controlled by Express Grant in Premises—Construction.*

R. was tenant for life of a house and premises, of which (subject to his life) he had made two leases, a lease expiring on the 13th of November, 1864, and a lease to J. expiring on the 13th of November, 1874.

On the 10th of November, 1864, R. executed a deed, by which, in consideration of a yearly rent of 50*l.* he granted and leased the property to J., his executors, administrators, and assigns, habendum from the 13th of November "for the term of R. for the term of his natural life"—

*Held*, that this deed was not void on the ground that it purported to create a future estate of freehold, as there was in the premises of the instrument an express grant of the life estate in præsenti, which was not controlled by the habendum.

EJECTMENT to recover possession of a public-house.

At the trial before Pollock, B., at the last Lancashire spring assizes, it appeared that one Royle, being tenant for life of the house, had granted a lease of it, at a rent of 42*l.* to one Tyrer, for ten years, expiring on the 13th of November, 1864. In 1858 Royle made another lease of the house to one Johnson for ten years (if Royle should so long live), from the 13th of November, 1864, when the previous lease would expire.

On the 10th of November, 1864, a deed was made between Royle and Johnson. By this deed, which was inartificially drawn, it was witnessed that in consideration of the rent thereafter

named (50*l.*), Royle “granted, demised, and leased to Johnson, his executors, administrators, and assigns,” the house in question, “to have and to hold the land and house, &c., hereby demised unto Johnson, his executors, administrators, and assigns, from the 13th of November for the term of the aforesaid John Royle for the term of his natural life.” Previously, on the 17th of February, 1864, Johnson had made an underlease to the plaintiff for ten years less ten days, from the 13th of November, 1864. On the 1st of October, 1870, the plaintiff granted a lease of the house to the defendant till the 29th of September, 1874. On the 10th of March, 1874, Johnson made a lease to the defendant for twelve years, from the 29th of September, 1874. On the 31st of October, 1874, the plaintiff procured from Royle a lease of fourteen years, from the 13th of November, 1874, when Royle’s first lease to Johnson expired. Under this lease the plaintiff sought to eject the defendant, who claimed under his lease from Johnson, and the question was, whether Johnson had a good title under Royle’s grant to him on the 10th of November, 1864.

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A verdict was directed for the defendant, with leave for the plaintiff to move.

A rule nisi having been obtained to enter the verdict for the plaintiff on the ground that the deed of the 10th of November, 1864, under which the defendant claimed, was void, and that notwithstanding it the deed of the 31st of October, 1874, under which the plaintiff claimed, was operative,

June 26. *Ambrose, Q.C.*, and *Crompton*, shewed cause, and cited *Germain or Jarman v. Orchard* (1); *Carter v. Madgwick* (2); *Goodtitle v. Gibbs* (3); *Buckler’s Case*. (4) They also referred to 8 & 9 Vict. c. 106, s. 6.

*R. G. Williams, Q.C.*, and *A. Bailey* (of the Chancery Bar) in support of the rule, cited *Sanders on Uses and Trusts*, 5th ed. vol. ii. p. 154, n. 8; *Co. Litt.* 133 a.

The nature of the arguments on either side will be found in the judgment of the Court.

*Cur. adv. vult.*

(1) 1 Salk. 346.

(2) 3 Lev. 339.

(3) 5 B. & C. 709.

(4) 2 Rep. 55, a, b.

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July 7. The judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) was delivered by

CLEASBY, B. (1) The only matter argued before us in this case was whether a certain deed of conveyance, dated the 10th of November, 1864, was incapable of taking effect and void, by reason that it purported to create a freehold interest to take effect in futuro.

Several questions were debated with much ability and research, but the argument turned chiefly upon the question whether, although the habendum in the deed purported to create such a freehold, still as, in what are called the premises, there is a grant not open to that objection, the deed could take effect in præsentī, and operate upon the estate of the grantor.

The grantor, one Royle, really had himself an estate for life, and at the time of the conveyance there were three days unexpired upon a previous term, which would expire on the 13th of November, 1864, as to which it did not appear who was possessed of that term, and besides, there was a term of ten years, of which Johnson, the grantee in the deed in question, was possessed, to expire on the 13th of November, 1874. The rent reserved by that lease was 40*l.* a year. Under these circumstances, the conveyance in question was executed by Royle to Johnson. The object seems to have been to secure to Johnson the whole of the interest during Royle's life, and for any period beyond the ten years he was to pay 50*l.* a year instead of 40*l.* a year. By the deed in question, Royle granted the property to Johnson, his executors, administrators, and assigns, habendum for the term of Royle's life, to commence from the 13th of November, 1874. (2) Now undoubtedly, by the habendum, the estate of freehold was to commence in futuro, and if such an estate cannot be created since 8 & 9 Vict. c. 106, and the terms of the habendum were to govern, the deed was void. But if the grant in the premises was to govern, notwithstanding the habendum, the deed was good. Similar questions have often arisen, but not exactly as in the

(1) The judgment was read by Amphlett, B.

(2) The grant, as before stated, was from the 13th of November, without

mentioning any year, but the Court inferred that the term was to commence from the 13th of November, 1874.

present case. The authorities establish, we think clearly, that if the grant in this case had been to Johnson, (omitting the words "administrators," &c.), then, as there would only be an implied estate for life in him, the express limitation in the habendum would destroy the implied estate, and as it would not in law take effect, being the creation of a freehold estate in futuro, the deed would be void. The authorities for this were, among others, *Buckler's Case* (1), and *Hogg v. Cross*. (2) It is also recognized as the rule in subsequent cases, particularly *Goodtitle v. Gibbs* (3), and indeed was hardly disputed. But the authorities also establish, we think, with equal clearness, that if the grant in the premises had been an express grant to Johnson for life, or to Johnson and his heirs, then the habendum, though void in itself, would not destroy the express grant in the premises, but the grant in the premises would take effect, of course so far as it could, upon the estate of the grantor. It is only necessary to refer to the case of *Goodtitle v. Gibbs* (3), and the lucid judgment of Abbott, C.J., after a full argument by Coote and Preston, in which this was expressly decided. The authorities are referred to in the judgment, *Carter v. Madgwick* (4); *Germain or Jarman v. Orchard*. (5)

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We have here a third case, a grant to Johnson, his executors, administrators, and assigns, not naming any term, and the question is, under which head this case comes.

It appears to us that the present case is not a case in which there is an implied estate from the grant in the premises, but an express estate with apt words.

We are entitled to look at the interest which the grantor had, and it was an estate for his life, and proper words of limitation for granting the whole of this estate in præsentia are used, viz. to the grantee, his executors, administrators, and assigns, as was forcibly pressed upon us in argument by the learned counsel for the defendant. It is impossible to say that this is a case in which an estate is only implied in the grantee.

The deed, therefore, takes effect upon the estate which the

(1) 2 Rep. 55, a, b.

(3) 5 B. & C. 709.

(2) Cro. Eliz. 254.

(4) 3 Lev. 339.

(5) Skin. 528; 1 Salk. 346.



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grantor had, and the effect of this is that the defendant, who claims under that deed, is entitled to succeed.

This makes it unnecessary to consider the other questions argued, viz. the effect of the whole deed, taken together, as intended to convey a present interest, and the effect of the statute in removing an objection to the creation of a freehold estate in futuro.

The rule must be discharged.

*Rule discharged.*

Attorneys for plaintiff: *Chester, Urquhart & Co., for Potter & Knight, Manchester.*

Attorneys for defendant: *Clarke & Son, for J. R. Horner, Manchester.*

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GABARRON AND ANOTHER v. KREEFT AND OTHERS.  
KREEFT AND OTHERS v. THOMPSON.

*Contract—Sale of unascertained Goods—Passing of Property—Bills of Lading drawn up and indorsed by Shipper in Fraud of Consignee—Liability of Shipmaster—Charterparty providing that Master shall sign Bills of Lading as presented.*

The defendants bought from one M. all the ore of a certain mine in Spain, to be shipped by M. at Cartagena on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or by longer bills on the execution of a charterparty, and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Several vessels had been loaded, and others chartered, and several payments made up to March, 1872, when the *T.*, one of the chartered ships, arrived at Cartagena. The payments which had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded, so that had M. shipped ore on the *T.* he would have been entitled to no payment in respect of it. He had ore which he could and ought to have shipped, taking bills of lading to the order of the defendants. Instead of doing this, before any ore was put on board the *T.*, he telegraphed to the defendants that he would not load the *T.* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *T.*, taking bills of lading, making the shipment to be by one S., and the cargo deliverable to S.'s order. No certificate in relation to this ore was ever given to the defendants. By the terms of the charterparty the captain was to sign bills of lading as presented. S. was a fictitious person, and M., after indorsing the name of S. on the bills of lading and then his own, indorsed them for value to the plaintiffs:—

*Held*, that the plaintiffs, as against the defendants, were entitled to the cargo; By Bramwell and Cleasby, BB., on the ground that though M. acted in breach of

his agreement, yet the manner in which the ore was put on board the *T.*, and the form in which the bills of lading were taken, shewed that the property in the ore did not pass to the defendants before or after shipment; By Kelly, C.B., solely on the ground that the charterparty justified the master in signing bills of lading, which gave the plaintiffs a title.

In an action on a charterparty by Messrs. K., the former defendants, as charterers, against the shipowner for not delivering a cargo on board the *M.* to the plaintiffs according to the charterparty, it appeared that the charterparty of the *M.*, which was one of the vessels chartered for carrying ore under the contract above-mentioned, did not authorize the master to sign bills of lading as presented, but the shipowner, by the charterparty, agreed to deliver the cargo to the plaintiffs. This cargo had also been fully drawn against, but *M.* obtained from the master bills of lading, as in the former case, and indorsed them for value to G., to whom the master delivered the cargo:—

*Held*, by the majority of the Court (Bramwell and Cleasby, BB.), that the defendant was not liable, on the ground that the master performed his contract by delivering the cargo according to bills of lading. By Kelly, C.B., dissenting, that the defendant was liable, as the property in the ore drawn against had passed to the plaintiffs, the purchasers, and as the master was not justified under the charter in giving bills of lading which were inconsistent with the rights of the plaintiffs.

THE action *Gabarron v. Kreeft* was a feigned issue to try the title to 400 tons of iron ore shipped at Cartagena on board a vessel called the *Trowbridge*.

*Kreeft v. Thompson* was an action by the plaintiffs as charterers against the defendant as owner of the ship *Macedonia*, the declaration stating that it was agreed between the plaintiffs and the defendant that the *Macedonia* should load at Cartagena from the factor of the plaintiffs a ballasting of 150 to 200 tons of iron, and therewith proceed to the Tyne to discharge at Tyne Dock, and deliver the same afloat to the plaintiffs or assigns on being paid freight, &c. Averment, that the ship loaded iron and proceeded to Tyne Dock, and the plaintiffs requested to have the iron delivered to them. Breach, that the defendant refused to deliver it to them. There was a second count in trover.

Pleas: First, denial of the charterparty; fifth, denial of breaches; eighth, on equitable grounds, that, after the making of the charterparty and before the alleged breach, one Gabarron and one Echeverria became assigns of the plaintiffs of the goods and of their right to have delivery made to them under the charterparty, for valuable consideration, and their property in the goods became vested in Gabarron and Echeverria, who requested the defendant

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to deliver the goods to them, which he accordingly did. Ninth, on equitable grounds, that, after the charterparty and before the alleged breach, a bill of lading, in three sets or parts, was presented and signed by the captain of the ship on behalf of the defendant, whereby he acknowledged to have received of one Sabadie the goods in the declaration mentioned, and undertook to deliver them for Sabadie to order, being paid for freight and all other conditions according to the charterparty. That the goods were loaded on board under the terms of the bill of lading; that Sabadie indorsed the bill of lading to one Munoz, who indorsed it for valuable consideration to Gabarron and Echeverria, to whom the property in the goods passed, and they required the defendant to deliver the goods to them under the bill of lading, which he accordingly did, and refused to deliver them to the plaintiffs. To second count, not guilty, and denial that the goods were the plaintiffs'. Joinder of issue.

The two cases were tried together before Bramwell, B., at the London sittings after Trinity Term, 1874.

In *Gabarron v. Kreeft*, a verdict was entered for the defendant, with leave for the plaintiffs to move to enter it in their favour; and in *Kreeft v. Thompson*, a verdict for the plaintiffs for 92*l.*, with leave for the defendant to move.

Rules nisi were afterwards obtained, in *Gabarron v. Kreeft*, to shew cause why the verdict should not be set aside and entered for the plaintiffs, on the ground that the property in the ore passed to the plaintiffs, or that the defendants were estopped from disputing that it so passed; in *Kreeft v. Thompson*, to shew cause why the verdict should not be entered for the defendant, on the ground that, under the circumstances, the property in the cargo passed to Gabarron & Co., or that the plaintiffs were estopped from disputing that it so passed, and also that there was no breach of the charterparty.

May 26, 28. *Benjamin, Q.C.*, and *R. E. Webster*, shewed cause, and referred to *Pickering v. Busk* (1); *Turner v. Trustees of Liverpool Docks* (2); *Thompson v. Dominy* (3); *Brown v.*

(1) 15 East, 38.

(2) 6 Ex. 543; 20 L. J. (Ex.) 393.

(3) 14 M. & W. 403.

*Hare* (1); *Gurney v. Behrend* (2); Benjamin on Sales of Personal Property, 2nd ed. p. 248.

*Watkin Williams, Q.C.*, and *Arbuthnot (A. L. Smith with them)*, in support of the rules, cited *Ellershaw v. Magniac* (3); *Ogle v. Atkinson* (4); *Falke v. Fletcher* (5); *The Chartered Bank of India v. Henderson* (6); *Gilbert v. Guignon* (7); *Moakes v. Nicholson*. (8)

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*Cur. adv. vult.*

The facts and the inferences of fact drawn by the Chief Baron and the learned judges, together with the nature of the arguments will be found in the following judgments.

GABARRON v. KREEFT.

July 7. BRAMWELL, B. It will be convenient in this case briefly to state the facts, as I appreciate them. The defendants bought from one Munoz all the ore of a certain mine in Spain, to be shipped by Munoz f. o. b. at Cartagena, on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or on the execution of a charter, and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. (9) Various vessels had been loaded, and others

- (1) 4 H. & N. 822; 29 L. J. (Ex.) 6.  
(2) 3 E. & B. 622; 23 L. J. (Q.B.) 265.  
(3) 6 Ex. 570, n.  
(4) 5 Taunt. 759.  
(5) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146.  
(6) Law Rep. 5 P. C. C. 501.  
(7) Law Rep. 8 Ch. 16.  
(8) 19 C. B. (N.S.) 290; 34 L. J. (C.P.) 273.  
(9) The original contract was in a letter, as follows:—

“124, Fenchurch Street,  
“London, 25th October, 1871.

“Señor Don Francisco Munoz, of  
Cartagena.

“We hereby confirm the verbal ar-

range made with you this morning respecting the produce of such of the Porman iron mines as may be in your hands, viz.:

“We agree to buy from you the whole of the iron ores which you may obtain from these mines within twelve months from this date, at the price of seven shillings and sixpence per English ton, delivered f. o. b. on ships at Porman, upon the conditions that you can obtain freight for all the ore so purchased by us. . . .

“You binding yourself to load the said vessels chartered by you when they arrive on your side, and also such vessels as we may charter. Payment for the ores to be made by your drafts upon us at fourteen days’ date if drawn



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chartered, and various payments made up to March, 1872, when the *Trowbridge*, one of the chartered ships, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that had Munoz shipped ore on the *Trowbridge*, he would have been entitled to no payment from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, he, on the 8th of April, and before any ore was put on board the *Trowbridge*, picked a quarrel with the defendants, telegraphed to them that he would not load the *Trowbridge* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *Trowbridge* and took bills of lading making the shipment to be by one Sabadie, and the cargo deliverable to Sabadie's order. It is agreed he had at the time of shipment no intention to ship for the defendants. In giving these bills of lading the captain was clearly justified, as the charter said he was to sign bills of lading as presented. Sabadie was a sham; the ore was the ore of Munoz. Munoz indorsed Sabadie's name on the bill of lading, and then his own, and then pledged it to the plaintiffs. The question is, whether the plaintiffs or defendants are entitled to the cargo.

If the cargo ever belonged to the defendants, it is certain that Munoz could confer no title unless by estoppel or otherwise, as hereafter mentioned. This is clear on principle, and is shewn by *Ogle v. Atkinson*. (1) Did then the ore ever belong to the defendants? Certainly not, till it was paid for. For the agreement was not a sale of specific property, but an agreement to sell all the ore to be produced. Did it become the property of the defendants on being paid for? The contract says it shall. But it seems to me impossible that it can be so. There is nothing to distinguish the ore paid for from that not paid for, certainly there is no evidence that the ore put on the *Trowbridge* was specially

against B/L., at three months date if drawn against charter; if the latter mode of payment is adopted you are bound to send us with advice of each draft an attested certificate that the

quantity of ore drawn for is actually in stock; and that this ore is to be considered our property, &c.

(Signed) "Kreeft, Howard, & Co."

(1) 5 Taunt. 759.

ear-marked as the subject of the cargo for it or any other ship. No certificate in relation to it was given as provided by the contract. It is impossible to suppose that if this ore had been stolen while in the possession of Munoz, though after it was paid for, the loss would have been the defendants', or that the defendants would not have had a right to reject this ore and object to its being loaded, or that Munoz might not have loaded other ore. These considerations seem to shew that no property passed in this ore before it was put on board the ship. Did that cause the property to pass? Now, it is clear that Munoz had no right to put any part of that ore on the ship except for the purpose of its being delivered to the defendants. On the other hand, it is equally clear to me, that had he said to the captain when loading, "I load this on my own account, and not on the defendants," and the captain had taken it on board, the loading, together with the other facts, would not have passed the property. But it does not appear that he said anything till he presented the bill of lading, and then he shewed that he had not loaded for the defendants but for his own purposes. If the property had passed on taking the bill of lading made out as it is, the loading was, in my opinion, nugatory. The captain knew no better, and was justified in giving the bill of lading as he did, but his doing so did not take the property out of the defendants, if in them, any more than it would if the ore had been bought and paid for by the defendants, stored in their yards, and shipped by Munoz as a mere agent: *Ogle v. Atkinson*. (1) The question, then, is reduced to this, did the property pass on actual shipment, the shipper having no right to ship except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking, when he does take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable.

If this matter were *res integra*, there would be strong ground for contending it did. It would be impossible to suppose that Munoz could be heard to say, "I was doing what was right if shipping as your property, wrong if shipping as mine, but it is the latter I did." If Munoz could not say this, neither, it is argued, could any one claiming title under him.

It is true that Munoz had told the defendants that he would not

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(1) 5 Taunt. 759.

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ship on their account, but they had equally told him he should, and should ship on no other, and he shipped. Suppose goods not specific were sold to be delivered by the seller into the buyer's cart when sent for, and the seller said, "I shall not put those goods in your cart unless you pay more than the agreed price, and the buyer said, "You shall, and I shall send my cart," and did, and the goods were put in it by the seller, it is clear that the seller could get no more than the agreed price. I know that different considerations may arise as to a cargo, but the question as between Munoz and the defendants is the same.

But the matter is not *res integra*, though there is no case precisely in point. *Ellershaw v. Magniac* (1) certainly is not. There the shipper had shipped a different cargo to what he had agreed to ship; the captain taking it on board knew that. He was bound to tell the shipper to take it out or to give him bills of lading deliverable to him. I am aware that a cargo of linseed was to be shipped, and that some linseed was shipped. But the plaintiff had a right to reject a part cargo. The case may be tested thus. If a bill of lading of the linseed had been given deliverable to the plaintiff he might have refused to receive it. Still that case shews that a shipper rightfully shipping for a buyer, can nevertheless get a bill of lading deliverable to himself. Neither is *Turner v. Trustees of the Liverpool Docks* (2) in point. For there the shippers had a right of lien on the goods till they were paid for in the agreed manner. But that case also shews that goods may be put by the seller on the buyer's ship with nothing, as appears, said at the time, and that nevertheless the seller may get a bill of lading deliverable to himself. It does not appear in that case that the shippers at the time of shipment said anything about the form of the bill of lading to be given, or reserved to themselves any right as to it.

Then there is the case of *Falke v. Fletcher* (3), in which Willes, J. (p. 409), uses expressions which go to shew that a shipper may ship saying nothing, and then demand a bill of lading in exchange for the mate's receipt in such form as he pleases. *Wait v. Baker* (4) is also not in point, because there the vendor had a right of lien. But

(1) 6 Ex. 570, n.

(3) 18 C. B. (N.S.) 400; 34 L. J.

(2) 6 Ex. 543; 20 L. J. (Ex.) 393. (C.P.) 146.

(4) 2 Ex. 1.

Parke, B., said, "The delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried." He said the same thing in *Van Casteel v. Booker*. (1) In *Moakes v. Nicholson* (2) it was held that retaining the bill of lading, though made out in the buyer's name, prevented the passing of the property. There, however, the vendor had a lien. Mr. Benjamin, on Sales, p. 306, thus sums up the result: "Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried." The cases seem to me to shew that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him.

It seems to me, therefore, that in this case the property never passed to the defendants, and the plaintiffs are entitled to recover. I feel bound by the authorities, which perhaps establish a more convenient state of law than would exist if bills of lading might be got deliverable to one person while the property was in another.

As to the question of estoppel, viz. that the defendants, having authorized the signing of bills of lading as presented, have authorized an act by which Munoz has been able to deceive the plaintiffs, I am of opinion that would not avail the plaintiffs if the property in the ore had passed to the defendants. The defendants no more enabled the commission of a fraud than they would have done if the ore had been their property, never that of Munoz, in their stores, and Munoz only an agent for shipment, and the charter in the present form. What the defendants have done is, supposing the property is theirs, to put it in the possession of Munoz, and so make him appear the owner. But if I hand my watch to a man

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(1) 2 Ex. 691; 18 L. J. (Ex.) 9.

(2) 19 C. B. (N.S.) 290; 34 L. J. (C.P.) 273.



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to keep for me, though I in a sense enable him to appear to be the owner, yet if he sells or pledges it, I do not lose my property.

I think judgment should be for the plaintiffs.

KREEFT v. THOMPSON.

This case differs from *Gabarron v. Kreeft* in the following particulars: It is an action on a charterparty by the charterers against the shipowner, for not delivering a cargo to the plaintiffs according to the charterparty. The charterparty did not authorize the captain to sign bills of lading *as presented*. By it the shipowner agreed to deliver the cargo to the plaintiffs. The loading had partly taken place while Munoz was intending to fulfil his contract, but was finished afterwards. The cargo had been specifically drawn against.

If I am right in my opinion in *Gabarron v. Kreeft*, the property in this cargo never passed to the plaintiffs. For I think it makes no difference that at the beginning of the loading, Munoz intended to ship for the plaintiffs. As I have said, the act is not complete till the bill of lading is given. Was the shipowner nevertheless bound by the charter to deliver the cargo to the plaintiffs? I think not. I think the charter only means that the cargo shall be delivered to the charterer if he has a right to receive it, and that he had no right to receive this. Then it will be said that the shipowner had no right to take it on board. I think he not only had such right but was bound to do so. I think that if Munoz had said to him, "I will not ship for the plaintiffs, but will ship for myself," and the captain had said, "I will not take the cargo, but sail away in ballast," he would have done wrong. A captain when he cannot get the agreed cargo is bound to take some other cargo, if he can get it, so as to lessen the loss. Suppose Munoz had wholly refused all shipment, and some other owner of ore had offered a shipment; the captain would have been bound to take it, and, had he done so, would not have been bound to deliver it to the plaintiffs.

I think, on the authorities referred to in *Gabarron v. Kreeft*, that the captain could not refuse to sign the bill of lading which Munoz required, unless he let Munoz take out the cargo, and that he would have done wrong had he required him to do so. There

is no suggestion in any of the cases cited in *Gabarron v. Kreeft* that any action would be maintainable against captain or owner for giving bills of lading to the order of the shipper. Besides, Munoz was the agent of the plaintiffs, and the captain was justified in signing bills of lading as he required.

I think our judgment should be for the defendant.

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CLEASBY, B. The question upon this interpleader is whether the plaintiffs or the defendants are entitled to a cargo of ore put on board a vessel called the *Trowbridge* at Cartagena.

The defendants had agreed to purchase of one Munoz all iron ore, the produce of a certain mine, and it was to be paid for either by bills at fourteen days, if drawn against bills of lading, or by bills at three months from date of charterparty. In this latter case it was provided by the contract of sale that certificates of the quantity being in store should accompany the bills, and that the ore so drawn for was to be considered as the property of the defendants. It is obvious that the bills of exchange in this latter case would not refer to the exact burden of the vessel designated, but to an estimate only of the quantity to be taken on board. Munoz loaded the *Trowbridge* with ore in the name of one Sabadie, and procured bills of lading making the ore deliverable to the order of Sabadie, which Sabadie indorsed to Munoz, and Munoz then indorsed them for a valuable consideration to the plaintiffs. It must be taken that Munoz was not justified in doing this, and that he made the refusal of the defendants to accept two more bills an occasion for breaking his contract, and the question is whether, under the circumstances of the case, the cargo of the *Trowbridge* had ceased to be the property of Munoz when he obtained the bills of lading afterwards indorsed to the plaintiffs. I say had ceased to be the property of Munoz, because it is, I think, clear that although the defendants agreed to buy the whole produce of the mine, the ore did not become the property of the defendants when it was taken for the time to the store, but was at that time the property of Munoz. It must be taken, I think, that by virtue of the payment the defendants had become entitled to a quantity of the ore in store, corresponding with the amount

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of the bills drawn against the charterer of the *Trowbridge*, but it cannot be doubted that this alone would not transfer the property in any particular part, and upon this no authorities need be referred to. And the question becomes whether by any subsequent act of appropriation the property in a particular part has passed?

The question, what is a sufficient appropriation, has formed the subject of many decisions. By referring to *Rohde v. Thwaites* (1) and *Brown v. Hare* (2), in any work on the subject of sales of personal property, all the authorities will be found.

In my opinion as soon as there was an appropriation, by which I mean an unconditional appropriation, of a part of the stock, that part would become the property of the defendants. Now it is said in the present case that, by the finding of the jury, up to a certain time Munoz was loading under the contract, and afterwards was not doing so. The effect of this would be as to so much as was loaded up to that time, the property would pass, and a question would then arise as to how far Munoz would affect the title of the defendants to what had been appropriated by delivering on board the vessel a quantity of other ore which could not be distinguished.

But in reality, upon all the facts found in this case, and dealing with them subject to the powers conferred upon us to draw inferences, there is nothing to shew that any quantity was delivered on board before the 8th of April, when it is clear that Munoz was not appropriating any as the property of the defendants, but only selecting what he should send by the vessel. There is no proof that part was loaded. The utmost evidence is that of the letter of the 11th of April, the contents of which, having been argued upon on both sides, may be taken as some evidence of the statements contained in it, and thus shewing that the *Trowbridge* and several other vessels were loading on that day. But coupling this with the date of the bill of lading, the 26th of April, I cannot regard this as proof that any quantity was loaded on the 8th of April. And if none was on board before that time, then it appears to me that the mere act of selection from the bulk of a particular part to be placed on board the vessel, is not such an appropriation

(1) 6 B. &amp; C. 388.

372; affirmed on error, 4 H. &amp; N. 822;

(2) 3 H. &amp; N. 484; 27 L. J. (Ex.) 29 L. J. (Ex.) 6.

as to make the contract of purchase operate on it. Because the selection was in the mind of the person selecting, not a selection of a portion of what had been paid for, but of what he alleged was not paid for.

It was further argued that, independently of the intention of Munoz to appropriate the ore loaded to the contract and particular drafts, the fact of loading the ore on board the vessel chartered by the defendants was of itself such an act as vested the property in them. But upon the effect of delivering a cargo contracted for on board the vessel of the vendee, the authorities are too numerous to refer to. I may mention *Turner v. Trustees of the Liverpool Docks* (1) as an early one (with *Ellershaw v. Magniac* in the note in that case (2)), and *Shepherd v. Harrison* (3) as the last. The effect of these is that the delivering of goods contracted for on board a ship when a bill of lading is taken is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee.

Such would, I think, be the proper conclusion, independently of the clause of the charterparty, that the captain is to sign bills of lading as presented. This does not mean merely as regards price or any particulars of that sort, because it is plain that when the charter was effected it was uncertain whether Munoz would not choose to draw at fourteen days against bills of lading, in which case he might, no doubt, have made the cargo, by the terms of the bills of lading, deliverable to himself. The captain knows nothing about the arrangements between Munoz and the defendants, he only knows that Munoz is the person who is to fulfil the charterparty on behalf of the defendants. Thus the defendants make it obligatory upon the captain to give to Sabadie or Munoz this document of title to property transferable by indorsement, and this, if not an estoppel against the defendants, as between them and the bonâ fide holder of this document of title, very much strengthens the conclusion that Munoz having this power expressly reserved to him, acted throughout with reference to it, as he did in fact exercise it to the last.

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(1) 6 Ex. 543; 20 L. J. (Ex.) 393.

(2) 6 Ex. 570, n.

(3) Law Rep. 5 H. L. 116.



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For the above reasons I am of opinion that the plaintiffs are entitled to succeed upon this issue.

## KREEFT v. THOMPSON.

This case is not like *Gabarron v. Kreeft*, in which the question of property only was involved. It is an action on a charterparty by the freighters against the shipowner. By the charterparty, the defendant was to receive from the factor of the freighters at Cartagena a cargo of ore, and deliver in the Tyne docks to the freighters or assignees. No question arises in the present case upon the pleadings, and the case is to be dealt with entirely on the facts; but as it is a question of contract, it is essential to see what the exact contract is, and it is to deliver to the freighters or assignees. The word "assignees" cannot mean, I think, assignees of the charterparty; but it may mean either assignees of the cargo or assignees of the bill of lading, which is the title to property in the cargo.

I must say I have very great difficulty in dealing with this case, from the scantiness of the materials for any decision. The question relates to the cargo of a vessel called the *Macedonia*, which it appears was chartered as early as the 9th of November, 1871, and drawn against on the 29th of November. It has been noticed that by the arrangement between Munoz and the plaintiffs the cargo might be drawn against either by bills at three months from the date of the charterparty, or at fourteen days from the bills of lading. It might appear from this that bills of lading were not to be taken except when they were drawn against. But that is not the case, the correspondence shews throughout that in cases where the bills had been drawn against the charterparty, bills of lading were still to be taken by Munoz, and forwarded to the plaintiffs. See, for example, the letter of the 29th of November, 1871, in which Munoz says: "We have drawn on you this day a bill for 123*l.*, at 90 days, which we place to your credit on account of cargoes per *Macedonia*, *Nautilus*, and *Messenger*, invoices of which will follow with their respective bills of lading." And as regards the cargo by the *Macedonia*, which we are now considering, and which had been drawn against so early as the 29th of November, we have the following in the letter of the plaintiffs

themselves, dated the 24th of January: "We are expecting bills of lading of *Macedonia* and *Retriever*, &c."

It is true there is nothing to shew that these bills of lading did not make the cargo deliverable to the plaintiffs. But this is not material, because the shipowner or captain knew nothing of the arrangement between Munoz and the plaintiffs, and if there were to be bills of lading, Munoz must be the person to determine in what form they should be, because it is admitted that he might draw in each case against bills of lading, in which case, no doubt, the bills of lading would be deliverable to himself, or he would have no security, and the captain would not ask him why he took the bills of lading deliverable to himself.

The effect of this seems to me to be that the captain *must* look to Munoz to determine how the bills of lading are to make the cargo deliverable, and that he performs his contract by delivering the cargo according to the bills of lading, though by the charter-party the cargo is deliverable to freighters or assignees. If he is addressed to Munoz as the factor of the shipper, and Munoz is to determine whether he will take bills of lading deliverable to himself, the shipper is bound by his act in having the goods made deliverable to himself, and it cannot make any real difference in substance whether by the bills of lading the cargo is made deliverable to Sabadie or to Munoz.

This seems to me a more satisfactory mode of deciding the case then by deciding it on the ground that the plaintiffs did not perform their part of the contract, because their factor did not send a cargo deliverable to the freighters or their assigns, although it really comes to the same thing.

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KELLY, C.B. The question in this case is whether a quantity of iron ore, shipped on board the *Macedonia* by one Munoz is the property of the plaintiffs Kreeft and others, and whether the master was bound to deliver it to them upon its arrival in England, or whether it had passed under the bills of lading to order, signed by the master at the instance of Munoz in favour of one Sabadie, and from whom it passed by indorsement to Gabarron, the plaintiff in the other action. I am of opinion that the ore had become

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the property of the plaintiffs, if not before, at the time when it was shipped on board the *Macedonia*; that the master was bound by the terms of the charterparty to deliver it to the plaintiffs upon the arrival of the ship in the Tyne; and that not having done so, his owner, whom the defendant represents, is liable to this action. The ore was shipped by Munoz at Cartagena, under a contract between him and Kreeft, by which Kreeft had contracted to buy from him the whole of the iron ores which he might obtain from the mines within twelve months from the 25th of October, 1871. And it was expressly agreed that Munoz should load such vessels as should be chartered by Kreeft, payment to be made at fourteen days' date, if drawn for against bills of lading, and at three months' date if drawn against charter. And Munoz to send with advice of each draft an attested certificate that the quantity of ore drawn for was actually in stock; *and that that ore was to be considered the property of Kreeft.*

The *Macedonia* was chartered by Kreeft, and by the charterparty the owner expressly agreed "to proceed to Cartagena, and load from the factor to the freighter (Kreeft) the quantity of iron in question, and therewith to proceed to the Tyne *to discharge at Tyne-dock, and to deliver the same afloat to the "said freighter (Kreeft) or assigns on being paid the agreed freight."*

The *Macedonia* proceeded to Cartagena, and Munoz having already drawn and Kreeft having accepted drafts exceeding in amount the price of the ore in question, and having taken it out of stock, and so separated it from the bulk of the stock, shipped the quantity of ore in question on board the *Macedonia*, the shipment continuing for several days, and no intimation having been given by Munoz to the master that the ore was otherwise than destined to and shipped for the account of Kreeft, the charterer of the ship. But when the shipment was complete, Munoz fraudulently prevailed upon the master to sign bills of lading for the ore to order, which afterwards passed by indorsement for value to Gabarron.

Under these circumstances I am of opinion that the whole case depends upon the contracts between the parties, that is to say, between Kreeft and Munoz, and Kreeft and the owner of the *Macedonia* respectively, and that Munoz having contracted that

the ore, when drawn for and the drafts accepted, should become the property of Kreeft, it became his property as soon as he had accepted beyond the amount of its price, and it had been separated from the bulk of the stock. But if this were doubtful I am clearly of opinion that it became his property the moment it was put on board the *Macedonia*. The case was contended in argument to be the same as if the plaintiff had purchased and paid for a quantity of merchandize which the seller contracted to deliver into the purchaser's waggon, when he should send for it, and that he had hired the waggon of the defendant, who had contracted to carry it to the plaintiff's warehouse and there deliver it to the plaintiff, but whose servant, the waggoner, having received it into the waggon, had signed a contract to deliver it, and had afterwards, in fact, delivered it to another person. It has been argued that the shipment was made with a view to the bill of lading, and with the intent to take a bill of lading to order, and that the shipment was not complete till the bill of lading was signed. No doubt the shipment and the bill of lading in general constitute but one transaction. But in this case it is to disregard altogether the contracts between the parties, to apply to it this general rule or practice. Here, Munoz had received a copy of the charter, and knew that the vessel had been chartered by the plaintiffs, and that the owner had contracted to receive the ore from him and to deliver it to the plaintiffs upon the ship's arrival in the Tyne. And I hold that it was not competent to Munoz, or to the master, or to both together, to change the property by the wrongful act of Munoz, or the unauthorized acquiescence of the master; the one in demanding, the other in granting the bills of lading. Upon the simple and plain ground, therefore, that under the contract between Kreeft and the shipowner, the master, as the agent of the owner, was bound to deliver the ore, on its arrival in the Tyne, to Kreeft, and that he could not exonerate himself of that obligation by the unauthorized signature of the bills of lading; it appears to me that Kreeft was entitled upon the arrival of the ship in the Tyne to the delivery of the ore, and consequently that the defendant is liable to this action for the non-delivery.

Many cases were cited on the one side and on the other, but it appears to me that none of them has any application to the case

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before the Court, except, indeed, the case of *Ellershaw v. Magniac* (1), where the facts were very similar to the present, but with this marked distinction, that there was no such express contract as here—that the property in the goods should vest in the purchaser upon their having been drawn for and the drafts accepted; and further, that a part of the goods only was shipped and the vessel filled up with other goods, for which the purchaser had not contracted, and so that as he was not bound to accept the one and had never contracted for the other, the property in neither had vested in him by the shipment.

On these grounds I am of opinion that the plaintiff Kreeft is entitled to the judgment of the Court.

GABARRON *v.* KREEFT.

This case differs from the last in one point only, but that one is all important. Here, the facts in all other respects being substantially the same, the charterparty of the ship (in this case called the *Trowbridge*) contained these words: “The captain to sign bills of lading as presented.” Now, these words appear to me not only to convey an authority to the master, but to impose an obligation upon him, to grant or sign bills of lading in whatever form and to whatever effect he might be required by Munoz to sign them. I think, therefore, that the bills of lading, though a fraud upon Kreeft, were granted and signed under and in strict pursuance of his authority, and having been indorsed for value to the plaintiffs, entitled them to the ore in question, and therefore to the judgment of the Court.

*Rules absolute.*

*Gabarron v. Kreeft.*

Attorneys for plaintiffs: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle-on-Tyne.*

Attorneys for defendants: *Fry & Hudson.*

*Kreeft v. Thompson.*

Attorneys for plaintiffs: *Fry & Hudson.*

Attorneys for defendants: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle-on-Tyne.*

(1) 6 Ex. 570, n.

## WARNER v. THE BRIGHTON AQUARIUM COMPANY.

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June 11.

*Profanation of the Lord's-day or Sunday*—21 Geo. 3, c. 49, s. 1—"Place of Entertainment or Amusement."

The defendants, a company incorporated by an Act of Parliament, are the owners of the Brighton Aquarium, a building which consists of chambers below the level of the ground, and a terrace above. The chief part is used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. The whole is open to the public on Sunday on the payment of 6*d.* each person. An action having been brought against the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment and amusement on the Lord's-day or Sunday :—

*Held*, that the aquarium, under the above circumstances, was a place of entertainment and amusement within the statute.

ACTION to recover a penalty of 200*l.* under 21 Geo. 3, c. 49, s. 1.

A case was stated for the opinion of the Court which was substantially the same as that in *Terry v. Brighton Aquarium Co.* (1), except that it was stated that the reading-room was used on week-days only, and the statements in *Terry v. Brighton Aquarium Co.* (1) as to a band playing sacred music on Sunday evenings, and as to newspapers and illuminated microscopes being provided in the building, for the amusement and entertainment of visitors, were omitted.

The question for the opinion of the Court was, whether under these circumstances the Brighton Aquarium was opened or used for public entertainment or amusement on the Lord's-day contrary to the statute.

*Sir John Holker, S.G.*, and *C. Bowen*, for the plaintiff.

*Manisty, Q.C.*, and *McMillan*, for the defendants.

*Sir John Holker, S.G.*, was not heard in reply.

THE COURT (Kelly, C.B., Bramwell, Cleasby, and Amphlett, BB.) held that, having regard to the decision of the Court of Queen's Bench in *Terry v. Brighton Aquarium Co.* (1), it was clear that the aquarium was a place of amusement within the meaning of the Act. The facts, that the band of music had been discon-

(1) Law Rep. 10 Q. B. 306.

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tinued on Sunday and that the reading-room was no longer available except on week-days, might make it not so much a place of amusement as before, but did not prevent it from being a place of amusement within the meaning of the Act.

*Judgment for the plaintiff. (1)*

Attorneys for plaintiff: *Raven & Hare, for The Solicitor to the Treasury.*

Attorneys for defendants: *Benham & Tindell.*

*July 7.*

LE MARCHANT v. THE COMMISSIONERS OF INLAND REVENUE.

*Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 38—Allowance for Loss of Annuity on Succession—Deprivation of Property on taking Succession.*

The tenant for life and his son the tenant in tail in remainder of real estates, by a disentailing deed in 1869, conveyed the estates to such uses as they should jointly appoint; and by a deed of even date in consideration of the son's intended marriage, appointed the estates to the use of trustees in fee from and after the marriage, subject to a proviso that if the father or son, or any person interested in the equity of redemption, should on a day named in 1870, pay to the trustees 20,000*l.*, with interest at 3*l.* per cent., the trustees should at any time on request reconvey the estates to the uses to which the equity of redemption should then stand settled; and the father covenanted that if the marriage was solemnized he would, so long during his life as the 20,000*l.* or any part should remain due to the trustees on the security of the deed, pay the trustees interest thereon at 3*l.* per cent.; provided that if he should pay the interest half yearly the trustees should not during his life call in the 20,000*l.* or any part; and the deed witnessed that the trustees should stand possessed of the 20,000*l.* upon the trusts declared by the marriage settlement of even date, viz. upon trust for the son for life with the usual trusts over for wife and children.

The marriage was solemnized, and the son received 600*l.* a year as entitled under the deeds until his father's death in 1874, when he became entitled in possession to the estates. In assessing the succession duty in respect of the estates under the Succession Duty Act, 1853, the son claimed an allowance in respect of the value of the annuity of 600*l.*, which he alleged he was "bound to relinquish" or was "deprived of" within s. 38:—

*Held*, by the majority of the Court (Kelly, C.B., Bramwell, B.), that the case was concluded by *Lord Braybrooke v. Attorney General* (9 H. L. C. 150; 31

(1) By 38 & 39 Vict. c. 80, the penalty, &c., for an offence under Queen has now power to remit any 21 Geo. 3, c. 49.

L. J. (Ex.) 177) and *Commissioners of Inland Revenue v. Harrison* (Law Rep. 7 H. L. 1), and that the allowance must be made.

By Cleasby, B., that those decisions were distinguishable, because the 600*l.* a year was payable, not during the joint lives of father and son, but during the father's life, and would have been payable to the son's widow if he had died in his father's lifetime: that there was therefore no deprivation within s. 38, and that no allowance could be made.

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THIS was a petition of Sir Henry Denis Le Marchant, Baronet, which contained the following statements:—

1. In January, 1875, the petitioner, in pursuance of the Succession Duty Act, 1853, gave notice to the Commissioners of the Inland Revenue of his succession to certain hereditaments in the county of Surrey to which he became entitled on the death of his father, Sir Denis Le Marchant, who died 30th of October, 1874, and of his liability to pay duty in respect thereof. And the petitioner claimed that in assessing such duty, an allowance of 600*l.* should be made to him by the commissioners in respect of the value of an annuity of 600*l.* per annum which had ceased and determined upon his taking such succession, and of which he was deprived; but the commissioners in assessing the duty payable in respect of the succession, refused the allowance and assessed the duty without making any allowance in respect of the annuity.

2. The petitioner gave due notice to the commissioners of his intention to appeal from their assessment as required by the 50th and other sections of the Act.

3. The circumstances under which the petitioner became entitled to claim the allowance are as follows:—

4. Thomas Le Marchant, by his will dated 25th of May, 1814, gave and devised certain moneys unto trustees upon trust to purchase therewith some freehold estate or estates of inheritance to be held by them upon the uses declared by his will, namely, to the use of his grandnephew the said Sir Denis Le Marchant, for life, with remainder to the use of the first and every other son of Sir Denis, severally and successively and in remainder one after another according to their respective priorities of birth in tail male, with divers remainders over.

5. The testator died in 1816, and his will was duly proved.

6. The moneys were accordingly duly laid out by the trustees and executors of his will in the purchase of certain freehold



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estates in Surrey, which were conveyed and settled to the uses declared in the will.

7. By a disentailing deed bearing date the 6th of September, 1869, and made between (1.) Sir Denis Le Marchant, (2.) the petitioner, and (3.) William Farrer, the estates were conveyed to William Farrer and his heirs, to such uses as Sir Denis and the petitioner should jointly appoint, and in default of such appointment and as far as no such appointment should extend, to the uses of Thomas Le Marchant's will. The disentailing deed was duly enrolled in the High Court of Chancery.

8. By an indenture of even date with the disentailing deed, and made between (1.) Sir Denis and the petitioner, (2.) the Honourable Sophia Strutt, now Sophia Le Marchant, and (3.) certain trustees, in consideration of a marriage shortly to be solemnized between the petitioner and Sophia Le Marchant, Sir Denis and the petitioner, under the powers granted and reserved to them by the above-mentioned disentailing deed, conveyed the estates to the trustees by way of mortgage, to secure a capital sum of 20,000*l.*, and Sir Denis thereby covenanted with the trustees as follows, that is to say:—"That in pursuance of an agreement in that behalf, and in consideration of the said intended marriage, he the said Sir Denis Le Marchant doth hereby, for himself, his heirs, executors, and assigns, covenant with the" trustees, "their executors and administrators, that if the said marriage shall be solemnized, then he the said Denis Le Marchant will so long during his life as the said sum of 20,000*l.*, or any part thereof, shall remain due and owing to the" trustees, "their executors, administrators, or assigns, on the security of these presents, pay unto the" trustees, "or the survivor or survivors of them, or the executors or administrators of such survivor, or their or his assigns, interest on the said principal sum of 20,000*l.*, or so much thereof as for the time being shall remain due, after the rate of 3*l.* for every 100*l.* for the year, such interest to be computed from the day of the solemnization of the said marriage." And it was by the indenture declared that the trustees should stand possessed of the 20,000*l.* and the interest thereon, upon the trusts declared of or concerning the same by an indenture of even date therewith, being the settlement executed on the marriage of the petitioner, namely, upon trust for

the petitioner for life, with the usual trusts over for wife and children. 1875

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9. During 1869, and in the lifetime of his father, the petitioner was married to the said Sophia Strutt, and thereupon under the provisions of the deeds of mortgage and of settlement aforesaid became entitled to receive and did thenceforth until his succession to the estates as hereinafter mentioned receive the yearly sum of 600*l*.

10. On the 30th of October, 1874, the petitioner's father died, whereupon the petitioner became entitled in possession and succeeded to the estates, and the annuity of 600*l*. a year payable to him as aforesaid ceased and determined.

11. The petitioner is advised that the refusal of the commissioners to make the allowance claimed is erroneous as being in contravention of the decision in *Commissioners of Inland Revenue v. Harrison*, in the House of Lords (1) and the other cases which preceded it.

The petition prayed the Court to reverse the decision of the commissioners, and to order the commissioners in assessing the duties to make to the petitioner the allowance claimed by him in respect of the value of the annuity of 600*l*. per annum, of which he has been so deprived as aforesaid, or such other allowance in respect of the matters aforesaid as to the Court should seem just.

The mortgage deed referred to in paragraph 8 was shewn to the Court during the argument, and the following parts were read:—It recited (*inter alia*) that “upon the treaty for the said intended marriage it was agreed that the said Sir Denis Le Marchant and Henry Denis Le Marchant” (the petitioner) “should charge the said messuages or tenements, farms, lands, and hereditaments hereinafter described and intended to be hereby appointed with the payment of the sum of 20,000*l*. with interest thereon, and that the said Sir Denis Le Marchant should enter into the covenant hereinafter contained for payment during his life of interest on the said sum of 20,000*l*. after the rate of 3*l*. for every 100*l*. by the year.” Then the indenture witnessed that Sir Denis and the petitioner appointed and conveyed the estates to the trustees of the third part

(1) Law Rep. 7 H. L. 1; 43 L. J. (Ex.) 138.

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and their heirs, habendum from and after the marriage to the use of the trustees, their heirs and assigns, "subject, nevertheless, to the proviso or agreement hereinafter contained for redemption of the same premises: Provided always and it is hereby agreed and declared, that if the said Sir Denis Le Marchant and Henry Denis Le Marchant, or either of them, or other the person or persons for the time being interested in the equity of redemption of the said premises shall, on the 2nd day of March next pay to the" trustees "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns the sum of 20,000*l.* with interest for the same after the rate of 3*l.* for every 100*l.* by the year without deduction (except for property or income tax), then the" trustees "or the survivors or survivor of them or the heirs of such survivor, their or his assigns, shall and will at any time thereafter, upon the request of the said Sir Denis Le Marchant and Henry Denis Le Marchant, or either of them, or any other person or persons for the time being interested in the equity of redemption of the said premises, reconvey the said hereditaments and premises hereby assured or intended so to be, to the uses upon the trusts and with and subject to the powers, provisos, and declarations to, upon, with, and subject to which the equity of redemption of the said hereditaments and premises shall then stand limited and settled."

Then followed the covenant by Sir Denis, set out in paragraph 8, and then this proviso: "Provided always and it is hereby agreed and declared between and by the parties to these presents, that if the said Sir Denis Le Marchant do and shall pay unto the" trustees "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns, interest for the said sum of 20,000*l.* after the rate of 3*l.* for every 100*l.* by the year by equal half-yearly payments on the days hereinbefore appointed for the payment of interest or within a calendar month afterwards, then and in such case the" trustees "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns shall not nor will during the life of the said Sir Denis Le Marchant call in the said principal sum of 20,000*l.* or any part thereof."

There were also clauses giving the trustees, for the purpose of

securing the 20,000*l.*, power to sell the estates after notice to pay the moneys due and default in payment, and among other clauses came the declaration of trust referred to in the concluding portion of paragraph 8.

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June 5. *Thesiger, Q.C.*, and *A. L. Smith*, for the petitioner. The petitioner, upon his father's death in 1874, became tenant in tail in possession of the estates, and having thus lost the annuity of 600*l.* a year, may be correctly said to be "bound to relinquish or be deprived of other property" of the value of 600*l.* a year within s. 38 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and to be entitled to the allowance provided by that section. (1) Sect. 1 enacts that the term "property" alone shall include real property and personal property; and that the term "personal property" shall include money payable under any engagement. *In re Micklethwaite* (2) decided that where A. covenants to pay B. an annuity during B.'s life, with a proviso that if B. comes into possession of certain estates the covenant shall cease, and B. does come into possession, he loses "property" within ss. 1 and 38, and is entitled to the allowance. Reflections were made on that decision by the Court of Exchequer in *Attorney General v. Sibthorp* (3), but it was expressly approved by the House of Lords in *Lord Braybrooke v. Attorney General*. (4) That case was followed in *Attorney General v. Floyer* (5), and both were expressly approved

(1) Sect. 38 enacts: "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

Sect. 34: "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the

successor may, previously to his possession, have laid out in the substantial repairs or permanent improvement of real property comprised in his succession: Provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value pro tanto of such real property."

(2) 11 Ex. 452; 25 L. J. (Ex.) 19.

(3) 3 H. & N. 424; 28 L. J. (Ex.) 9.

(4) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

(5) 9 H. L. C. 477; 31 L. J. (Ex.) 404.



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and followed in *Commissioners of Inland Revenue v. Harrison* (1), where it was held that the fact that the instrument creating the annuity was executed after the passing of the Succession Duty Act made no difference.

*Sir R. Baggallay, A. G., and W. W. Karslake*, for the Crown. No attempt will be made to contest the three last-mentioned decisions; but the present case is quite different.

[CLEASBY, B. If Sir Henry had died in Sir Denis's lifetime, the annuity would still have been payable to Sir Henry's widow, and the estates on Sir Denis's death would have gone to Sir Henry's eldest son, who would have lost nothing.]

Yes, and there lies the distinction between the present and the other cases. To bring it within s. 38, the property lost must by the instrument which gives it be limited to determine at the time when, and for the reason that, the successor comes into possession of the succession. That was so in *Lord Braybrooke v. Attorney General* (2), where the tenant for life and his son, the tenant in tail in remainder, executed a deed giving to the son a rent-charge or annuity, payable out of the estates during the father's life. That rent-charge, by virtue of the deed creating it, ceased when the son became tenant in tail in possession. So in *Commissioners of Inland Revenue v. Harrison*. (1) In the present case it is a mere accident that the succession to the estates and the ceasing of the annuity occurred together. They would not if Sir Henry had died before Sir Denis. This point was the *ratio decidendi* in *Lord Advocate v. Earl of Glasgow* (3), where the late earl, the heir of entail in possession of certain estates, with the consent of his brother, the present earl and then presumptive heir of entail next in succession, charged the estates with certain incumbrances, and executed bonds of annuity for moneys to be paid by the late to the present earl during their joint lives and to terminate at the death of the first deceiver of them. On the death of the late earl without a son the present earl became heir of entail in possession, and claimed an allowance under s. 38 in respect of the annuities of which he had been deprived. The Court of Session (Lords Ormi-

(1) Law Rep. 7. H. L. 1.

(3) Scottish Law Reporter for Feb. 3,

(2) 9 H. L. C. 150; 31 L. J. (Ex.) 1875, vol. xii. Nos. 13, 14, p. 215.

dale, Neaves, Gifford, and Lord Justice Clerk) held (January 15, 1875), that no allowance could be made, and that s. 38 did not apply, since the succession to the estates and the termination of the annuity, though actually coincident, were not necessarily so—not cause and effect; for if the late earl had left a son the present earl would not have succeeded to the estates, though he would have lost the annuities; or, on the other hand, if the late earl had committed an irritancy and so forfeited the estates, the present earl would have enjoyed during their joint lives both the estates and the annuities. The Scotch judges relied on this as distinguishing the case from the decisions in the House of Lords. The present is not a case of an annuity like those in the House of Lords; it is one of an incumbrance on the estate to the amount of 20,000*l*. The covenant by Sir Denis added nothing; the effect of the proviso not to call in the 20,000*l*. if the interest was paid regularly was to make the covenant for the benefit of Sir Denis, since he was obliged to pay 3*l*. per cent. only. If Sir Denis had paid off the 20,000*l*., it would have been invested by the trustees upon the trusts of the marriage settlement, perhaps at 5 per cent., so as to produce more than the covenanted 600*l*. a year. Sir Henry would have been the gainer; and this gain would have continued after Sir Denis's death; for Sir Henry would have come into possession of the estates freed from the mortgage, and the income of the 20,000*l*. would have been paid to him for his life and to his widow and children afterwards. Under those circumstances could s. 38 possibly apply?

[BRAMWELL, B. Is not the case this? While his father lives Sir Henry has some property out of his father's estate. After his father's death, Sir Henry has the same property or a substitute, but out of his own estate. Therefore, on succeeding to his own estate he is deprived of or loses the property which he had received out of his father's estate.]

No; the present case is an attempt to evade s. 34, the effect of which is that a successor cannot create a charge on his succession, so as to entitle himself to an allowance under s. 38. A similar attempt was defeated by the decision in *In re Peyton* (1), which

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1875 governs the present case. This Court will not extend the principle of *Lord Braybrooke's Case*. (1)

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*A. L. Smith* replied.

*Cur. adv. vult.*

July 7. The following judgments were delivered (2):—

CLEASBY, B. I am quite as much determined as my learned Brothers are to give full effect to the decision of the House of Lords in *Lord Braybrooke v. Attorney General* (1), followed by *Attorney General v. Floyer* (3), and finally by *Commissioners of Inland Revenue v. Harrison* (4); and the only reason for my not coming to the same conclusion is that I do not feel justified in giving what appears to me to be a different character from the real one to the arrangement entered into, so as to make those decisions applicable.

The question is, whether, on the succession of Sir Henry Le Marchant to the estates, there was a deprivation coming within s. 38 of the Succession Act so as to entitle him to a deduction. If, when the property was disentailed, a rent-charge had been charged on the property for the joint lives of himself and his father, the cesser of that rent-charge, upon the death of the father, would have been regarded as a deprivation and the subject of a deduction. To see whether the same reason applies, we must consider what the arrangement was in this case. It seems clear to me that as the annual payment of 600*l.* a year by Sir Denis was only substituted for the charge upon the property in case he paid the annuity regularly, we must consider, not the annuity, but the charge for which it was substituted. In reality, what the settlement made on the marriage required was the security, and not the personal covenant; and the personal covenant was solely in relief of Sir Denis, to prevent the interest of the sum charged—800*l.* or 900*l.*, according to the rate of interest—being paid out of rental so long as he paid the 600*l.* a year.

The effect of the deed is shortly given in paragraph 8 of the petition. The consideration for the deed was the contemplated marriage,

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

(3) 9 H. L. C. 477; 31 L. J. (Ex.) 404.

(2) That of Cleasby, B., was a written judgment.

(4) Law Rep. 7 H. L. 1; 43 L. J. (Ex.) 138.

and the estates were conveyed by way of mortgage to trustees to secure a capital sum of 20,000*l.*, and the trustees were to stand possessed of the principal sum and interest upon the trusts declared in the marriage settlement of the same date. The trusts of the marriage settlement were for Sir Henry during his life, then for his wife if she survived, and then for the children of the marriage. The deed is imperfectly set out, but a copy of it was handed up, and it appeared that the mortgage was to secure 20,000*l.*, with interest thereon, and that it was provided that if Sir Denis paid the trustees regularly interest at the rate of 3 per cent. the trustees would not during his lifetime call in the principal sum of 20,000*l.* And there was a covenant by Sir Denis, so long as the 20,000*l.* was due and owing during his life, to pay to the trustees the interest at the rate of 3 per cent.

Now the question of deprivation or not cannot depend upon whether the interest was paid by Sir Denis to the trustees or received by the trustees on raising the charge, it is in either case to be received by the trustees. Supposing, then, that the 20,000*l.* had been forthwith raised, and interest at the rate of 4 per cent. been paid upon it, what would the trustees be bound to do with it? They must of course pay it to Sir Henry during his life, afterwards to his widow, and so on. This is quite independent of the life of Sir Denis, and must go on just the same until the charge is redeemed. What deprivation, then, is there upon the death of Sir Denis, if a permanent charge continues before and after his death, because the estate which is encumbered with the charge comes to Sir Henry?

The question in the present case is not how the encumbrance is to be considered in valuing the succession, but whether there is a deprivation of the interest or annuity. It would be noticed as regards the annuity, that Sir Denis is to pay it, not during the joint lives, but during his own life; and this shews how different the case is from *Lord Braybrooke's* (1) and the other cases. For, suppose that in this case the son had died before the father, Sir Denis would have gone on paying the annuity to the trustees for the widow, according to his covenant, just as the interest of the charge would have gone to her. In that case the

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estate would have gone to the grandson, Sir Henry being tenant in tail, and in that event things would have gone on after the death of Sir Denis exactly the same as before, the widow receiving the annuity and the grandson enjoying the estate, and nothing approaching to a deprivation could have been suggested on the death of Sir Denis. The death of Sir Henry before or after Sir Denis cannot, I submit, make a difference as to the nature of this present charge, and therefore it appears to me that upon the correct view of the argument in this case there is no deprivation.

No doubt, by substituting for the actual arrangement a different arrangement leading (but only in the events which have happened) to a similar result, ingenious reasons may be given for making out an apparent case of deprivation within the authorities. But I apprehend we ought to look at the arrangement itself to see whether it gives rise to a deprivation. By departing from the actual arrangement, we might in some cases, as in this, come to a conclusion advantageous to the successor; but the substitution of a different arrangement for the actual one, though in a particular event and for a time equivalent, might in other cases act most prejudicially to the subject. I do not find that anything of the sort has been done in any of the decided cases, and I do not feel myself justified in doing so.

One argument used was that during Sir Denis's lifetime Sir Henry got the interest or annuity out of the estate of Sir Denis, and that after his death it came out of his own estate. This reasoning appears to me open to the alternative objection of proving nothing, or being a *petitio principii*. It arises, I venture to say, from confounding two things, an encumbrance on the property and a deprivation. It proves that 'the property is encumbered when the property comes to Sir Henry, which is nothing, and then assumes this to be a deprivation. The encumbrance would have entitled Sir Henry to an allowance but for the objection that, being created by himself, it comes within s. 34 of the Act; but this does not make it a deprivation. In my opinion, therefore, there was in this case no deprivation, and the deduction in respect of the annuity ought not to be made.

BRAMWELL, B. I am sorry to say that I cannot agree with my Brother Cleasby's judgment in this case. It seems to me

that the petitioner is entitled to our decision in his favour. I think the case is governed by *Lord Braybrooke v. Attorney General*. (1) Whether that case was rightly decided or not, it binds us. For my own part I am willingly bound by it, because in that case the judgment of this Court (2) was founded upon a narrow view of the statute, which undoubtedly would lead, if acted upon, to cases of hardship. I think *Lord Braybrooke's Case* (1) has effectually decided that you must read s. 38 of the Succession Duty Act, as though it had in it, besides the words, "where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property," some such words as these, "cease to enjoy." If that is so, has the petitioner in this case ceased to enjoy the annuity? It may be very easily proved that he has, by asking this question—Does he at present enjoy his estate and 600*l.* a year? He does not: that is quite certain. Therefore, though he has got the estate, he has lost, or been deprived of, or ceased to enjoy the 600*l.* a year. One might almost leave the matter there if I am right in my understanding of what *Lord Braybrooke's Case* (1) has in effect decided. We must remember also that in dealing with this Act of Parliament we must not look at it technically, but we must consider the substance of the matter and regulate our decisions upon that.

But it is suggested that the annuity of 600*l.*, or its equivalent, continues, because it is said that by the covenant of Sir Denis and the arrangement made upon the marriage, 20,000*l.* is to be raised, the interest of which is to be payable to the petitioner, Sir Henry, for his life; and it is alleged that he is enjoying that now, because of the alternative provision, that Sir Denis should not be called upon to find the 20,000*l.*, or to allow it to be raised upon the estate, provided he paid 600*l.* a year. Then it is said, that being so, what the petitioner really enjoyed was the interest, or equivalent of the interest of that 20,000*l.*, and that he is enjoying it still. So he is in a sense, but how? He is enjoying it by first of all paying it to the trustees, and then receiving it back from them, for it comes out of his estate. Therefore, though in one sense he may be said to enjoy the interest of the 20,000*l.*, yet in a substantial sense he cannot be said to do so, because he

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(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

(2) 5 H. & N. 483; 29 L. J. (Ex.) 282.

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only enjoys it from first of all paying it. That would shew to me that he has been deprived of, or ceased to enjoy, that property under s. 38 of the Succession Duty Act.

Now if the arrangement had been that during the life of Sir Denis, the father, the 600*l.* a year should be paid, not out of the settled estates which have come to Sir Henry, the petitioner, but out of some real estate of the father's which did not come to the petitioner, could there be any doubt that *Lord Braybrooke's Case* (1) would govern the present one? It appears to me clear that it would. Then what is the difference in substance? None, to my mind. The only difference is an immaterial one; that is to say, that the 600*l.* a year during the life of the father was coming out of the estate which afterwards came to the son, instead of coming out of the estate which did not come to the son; but the result is the same, that the 600*l.* a year comes out of the pocket of the father during his life, and it now comes out of the pocket of the son. The consequence is that he is 600*l.* a year poorer than he would have been had that benefit been continued to him. I think, therefore, upon the authority of *Lord Braybrooke's Case* (1), that he has been "bound to relinquish," or has been "deprived of," or ceased to enjoy, the property, to the amount of 600*l.*; and consequently I think our judgment should be for the petitioner.

KELLY, C.B. I entirely concur in the judgment delivered by my Brother Bramwell. The substance of the case is simply this: The petitioner is to receive during the life of his father this annuity or indemnity—or whatever it may be called—this 600*l.* a year. Upon his father's death he ceased to receive it, and it was lost to him altogether. I think it is clearly a case within the principle of these decisions of the House of Lords, of which I need hardly say I entirely approve, but were it otherwise this Court would be bound by them. I therefore agree with my Brother Bramwell that the judgment in this case must be for the petitioner.

*Judgment for the petitioner.*

Attorneys for petitioner: *Paterson, Snow, & Burney.*

Attorney for the Crown: *Solicitor of Inland Revenue.*

THE ATTORNEY GENERAL *v.* THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION, LIMITED.

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*Inland Revenue—Inhabited House Duty— Dwelling House divided into distinct Tenements—*48 Geo. 3, c. 55, sch. B, rules 6, 14—*Valuation List—Valuation (Metropolis) Act, 1869* (32 & 33 Vict. c. 67), ss. 45, 76.

The Westminster Chambers in the metropolis belong to an association and consist of several blocks of building. Each block is divided into two ranges by an internal staircase having only one door at the principal or street entrance, and is in its internal arrangement structurally divided into different tenements or suites of rooms, which, like chambers in the Inns of Court, are quite distinct from and have no means of communication with each other, except that each has an open door opening on to the common staircase. The street door is locked at night, and a porter, appointed and removeable by the association, resides in a distinct suite of rooms in the basement of the block, and has a key of and access to each of the suites of rooms for general superintendence, and as the tenant's servant. The association have power by statute to demise or sell any suite separately. Some of the suites have never been let, but most are let as chambers, offices, or residences, to tenants for a term, at yearly rents, payable quarterly, under written agreements, which contain clauses more than usually stringent on the tenants as to repairs and mode of occupation. The association provide gas for the staircases, halls, and passages, and water for the entire building, and pay rates and taxes, charging the tenants higher rents in consequence. The tenants have the right to the services of the porter upon certain terms. In the valuation list prepared under the Valuation (Metropolis) Act, 1869, each suite of rooms is treated as a separate hereditament, the respective tenants thereof being separately assessed to the poor-rate as the occupiers; and the Court of Queen's Bench decided that for the poor-rate the suites were rightly treated as separate hereditaments:—

*Held*, by the majority of the Court (Bramwell and Cleasby, BB.), that for the purpose of the inhabited house duty, rule 6 of 48 Geo. 3, c. 55, sch. B, applied, and that the association must be assessed as occupiers of each block treated as one dwelling house; and that the respective tenants of the different suites must not be assessed as occupiers of distinct properties under rule 14.

*Held*, also, that the value of each block was properly represented by the aggregate sum of the values appearing in the valuation list, although, owing to some of the suites being unlet and producing no rent, the valuation list did not correctly represent the annual value to the association.

*Contrà*, per Kelly, C.B., that for the purpose of the inhabited house duty rule 14 applied, and that the respective tenants of the different suites must be assessed as occupiers of distinct properties.

THIS was a proceeding for the recovery of 548*l.* 17*s.* for duties under the statutes relating to the inhabited house duties; and by consent and under the order of Cleasby, B., dated the 2nd of



1875 November, 1874, according to 22 & 23 Vict. c. 21, s. 10, the following case was stated :—

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1. The defendants object to an assessment to the inhabited house duty made for the year 1871, due the 1st of January, 1872, upon certain premises called the Westminster Chambers, belonging to the defendants, in Westminster, Middlesex, and in the metropolis, as defined by the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67.

2. The Westminster Chambers consist of 7 blocks of building, having 7 principal entrances. Each of these blocks is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance, and each block is in its internal arrangement structurally divided into different tenements or suites of rooms which are quite distinct from each other, like chambers in the Inns of Court; and they are let and occupied, and are in every instance capable of being let and occupied, separately as chambers, offices, or residences. Each tenement or suite has an open door opening on to a staircase common to all, and also an inner private hall or passage, a water-closet, and a lavatory. There is no means of communication between those suites other than the staircase common to all. Nearly all the suites are let and used as offices or chambers for business purposes, and they are locked and unoccupied during the night. A few only of the suites in three of the blocks are used as residences.

3. The outer or street door to each block is kept locked at night, and a porter who is appointed by the association resides in a distinct set of rooms in the basement of each block, and has a key of and access to the suites of rooms in such block in the occupation of the tenants as their servant, and "the regulations" hereinafter referred to, shew more fully the mode in which the porters are appointed and employed.

4. The Westminster Improvement Act, 1853 (16 & 17 Vict. c. 176, s. 69), applies to the association and the property in question, and enacts that where any house erected on land of the commissioners shall be occupied or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors or assigns, may, if they shall think fit so to do,

demise or sell any set of apartments separately from the rest of the said house. The association hold the Westminster Chambers by title derived from the commissioners, whose assigns they are. None of the suites of rooms have been sold, but the greater number have been demised for seven, fourteen, or twenty-one years.

5. The association provide gas for the staircases, halls, and passages, and water for the entire buildings, and pay all rates and taxes in respect thereof, charging their tenants higher rents in consequence.

6. Each tenement or suite is held under a written agreement. A copy of the old form of agreement, which has been disused for some time, is set forth in the report of the case of *Reg. v. St. George's Union*. (1) The form of agreement, of which a copy, marked A, is appended to this case, and is to form part of it, is the one now in use. (2)

7. Each block is not inserted in the valuation list prepared in pursuance of the Valuation Metropolis Act, 1869, as one hereditament, but each tenement or suite is treated therein as a separate hereditament and assessed accordingly, the name of the tenant of each occupied suite being inserted as the occupier thereof. There are in the 7 blocks 117 of these suites thus separately assessed. The tenants thereof are separately charged and assessed to the poor-rate in conformity to the valuation list.

8. The following extract from the district tax assessment for the year 1871-72, shews in detail the different modes in which the inhabited house duties have by the house tax commissioners been assessed on the premises :—[see next page].

9. The commissioners for the district in assessing the property for 1871 for the inhabited house duty to an amount of duty in the aggregate of 548*l.* 17*s.*, have treated the whole of the buildings (with the exception of the Imperial Bank premises, being part of block No. 1, which, having a separate communication direct with the street, are separately assessed on the bank as occupier to a duty amounting to 11*l.* 16*s.* 3*d.*) as 7 separate inhabited houses, and have assessed the same to the association itself as "occupiers," and not to their tenants whose names appear in the valuation list.

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(1) Law Rep. 7 Q. B. 90.

(2) Post, p. 312.

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INHABITED HOUSE DUTIES.									
Number of Assessment.	Name of street or place and Christian and surnames of occupiers.	Number of House.	Description as to trade, profession, and purposes for which the premises are occupied.	Gross annual value of the premises as fixed by the Valuation List.	Duty payable at 6d. in the pound in respect of any dwelling house occupied			Duty payable at 3d. in the pound in respect of any dwelling-house not occupied and used for any of the purposes described in the preceding columns.	
					By any person in trade who shall expose to sale any shop or warehouse being part of the same dwelling-house, and in the front and on the ground or basement story thereof.	By a person duly licensed to sell therein by retail, beer, &c.	As a farm-house by a tenant or farm servant and bona fide used for the purpose of husbandry only.		
	Victoria Street. The Mutual Tontine Association, Limited. G. S. Sidney, Secretary.		Westminster Chambers.	£				£ s. d.	
262	"	Nos.	{ House or building let in tencments . }	2,650				99 7 6	
263	"	"		1,349				50 11 9	
264	"	"		2,622				98 6 6	
265	"	"		1,850				69 7 6	
266	"	"		2,742				102 16 6	
267	"	"		1,760				66 0 0	
268	"	"		1,663				62 7 3	
				14,636				548 17 0	

10. The value upon which the assessment of each block is made is taken from the valuation list, and is the sum of the values inserted there with respect to all the 117 suites in that block. Several of the suites have never been let since the Westminster Chambers were built. Out of the 117 suites only 99 are let.

11. The inhabited house duty is now levied under the authority of 14 & 15 Vict. c. 36, of which s. 2 enacts that all duties imposed by the Act shall be assessed and levied according to the regulations contained in 48 Geo. 3, c. 55, sch. B.

12. The material parts of schedule B. are as follows:—

A schedule of the duties made payable on all inhabited dwelling houses throughout Great Britain, according to the value thereof, and of the offices and lands to be charged therewith:—

Rules for charging the said last-mentioned duties:

Rule 1. The said last-mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house, being of the annual rent of five pounds or upwards, at the respective rates before mentioned, and to be levied on him, her, or them, or on his, her, or their respective executors or administrators, and in like manner, in case of a change in the occupation thereof, as is before directed in respect of the duties on windows or lights.

Rule 4. Every chamber or apartment in any of the Inns of Court, or of Chancery, or in any college or hall in any of the universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof.

Rule 6. Where any house shall be let in different storeys, tenements, lodgings, or landings and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling house, and shall be charged to the said duties.

Rule 7. No dwelling house or other such premises as aforesaid shall be estimated or rated at any less annual value than the rent or value at which the same premises stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place.

Rule 8. In case the said poor-rate should have been made throughout by a pound rate on the full annual value of all the dwelling houses in the same parish or place, then such assessment shall be made according to the said rate and the assessors appointed or to be appointed for the said duties shall, in making their assessments on different dwelling houses in the same parish or place in all such cases as aforesaid, observe the same rule of proportion between the assessment of the duties granted by this Act thereon as shall have been observed in making such poor-rate as to all the premises aforesaid rated in such poor-rate.

Rule 9. In case the said poor-rate shall have been made on any proportionate part of such value, then such assessors shall assess the same at the same sums respectively as they would have been assessed at by virtue of this Act if the

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same had been respectively estimated in such poor-rate at the full value thereof respectively.

Rule 11. In case any house, with the premises aforesaid therewith occupied, shall not be rated in such poor-rate or shall be rated therein together with other property not chargeable to the duties hereby granted, or there shall be no poor-rate in the parish or place where such house is situate, and in every case where the rules before mentioned are not applicable, the said assessors shall make their assessment from the best information they can obtain of the annual value thereof, which in all cases shall be the actual amount of the rent at which the said houses and premises aforesaid respectively are let, or, if not let, the rent which they respectively are worth to be let by the year.

Rule 14. Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively.

13. By s. 45 of 32 & 33 Vict. c. 67 (the Valuation (Metropolis) Act, 1869), it is enacted :

That the valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall, for all or any of the purposes in this section mentioned, be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted : that is to say :

(2.) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely :

(a) The tax on houses levied under the House Tax Act and the Acts therein incorporated or referred to.

By s. 76 it is enacted :

That, where, for the purpose of the Acts relating to the duty on inhabited houses, or to the duties charged under Schedule B of the Income Tax Act, or to the sale of exciseable liquors, it is necessary to make a separate valuation of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not been passed.

14. In 1870, before the Valuation (Metropolis) Act came into operation, the Commissioners of Assessed Taxes submitted, under 48 Geo. 3, c. 55, a case to Keating and Hannen, JJ., asking their opinion whether the assessment of the property of the association to the house duty should be on seven blocks of buildings or on each suite as distinct properties, according to rule 14 of schedule B. The two judges decided that the property in question should be assessed in seven blocks. Such case was drawn by the commissioners, but the representatives of the association were not

consulted upon it, and it does not, in the opinion of the association, sufficiently state the facts.

15. In the course of each year some of the suites in each block are unlet and unoccupied, and consequently the association derive no rent from the same, and the aggregate sum of the values which appear in the valuation list does not therefore represent the annual value of the block to the association.

In three of the blocks, namely, Nos. 2, 3, and 7, one or more tenants of the association reside, so that if each block is a house liable to be assessed at one sum for house duty, such three blocks are in part inhabited. No tenants reside in the other blocks, but all use the same as offices or chambers only.

16. The association, when they found that their tenants were separately charged and assessed to the poor-rate for each suite occupied by them (being 117 in all) appealed, under the provisions of the Valuation (Metropolis) Act, 1869, against the valuation list, on the ground that the 7 blocks were not 117, but 7 rateable hereditaments; but the Court of Queen's Bench decided that each tenement or suite of rooms was a separate rateable hereditament, and that the valuation list rightly treated them as 117 rateable hereditaments: *Reg. v. St. George's Union*. (1)

The questions for the Court are—

1st. Whether the property is properly assessed to the inhabited house duty, as 7 dwelling-houses only, on the association as occupiers; or whether each of the 117 suites or sets of chambers, of which the entire buildings consist, should be separately assessed on the tenants thereof respectively.

2ndly. If the Court should be of opinion that the property is properly assessed as 7 separate dwelling-houses for the purpose of assessing the inhabited house duty, then, whether the value of each of the 7 blocks is properly represented by the aggregate sum of the values which appear in the valuation list as those of the separate hereditaments in the occupation of the tenants of the association in that block, or whether the commissioners ought not to make a separate valuation on the association itself of each block under s. 76 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

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The Court is to be at liberty to draw inferences of fact.

Judgment to be entered up in accordance with the answers given to the questions.

A. (Copy Form of Agreement.)

An agreement made the            day of            One thousand eight hundred and             
Between The Mutual Tontine Westminster Chambers Association  
(Limited), by            their secretary, hereinafter called the lessors, of the one part,  
and            hereinafter called the lessee, of the other part.

The lessors hereby let, and the lessee hereby take, all            rooms numbered             
and being on the            floor of the buildings, and numbered            of the  
chambers belonging to the association called The Westminster Chambers,  
situate in Victoria Street, in the city of Westminster, together with the use  
of the water-closet and washing-closet attached thereto, and also the use,  
in common with the other tenants, of the entrance-hall and stairs and lift leading  
to the same premises, for the term of            year, from the            day of           ,  
One thousand eight hundred and           , and so on from year to year, at the  
yearly rent of           , payable by equal quarterly payments on the usual  
quarter-days, free from all deductions whatsoever, the lessors hereby agreeing to  
pay all taxes, rates, assessments, and impositions, parliamentary, parochial, or  
otherwise, charged or to be charged on the premises. And the lessors and lessee  
hereby mutually agree as follows:—The lessee,            executors, administrators,  
and assigns will not do, or permit to be done, any damage or waste to the pre-  
mises; and will, at least once in every two months during the term hereby  
granted, properly clean the windows of and belonging to the said demised pre-  
mises, and will, as often as occasion requires during the term, repair, maintain,  
and keep the premises in such repair as that the same shall be at all times suit-  
able and ready for the occupation of a tenant. The lessee will once at least  
during every period of four years, if the tenancy shall be so long continued, paint  
in the best manner with two coats of paint, all the inside woodwork of the  
demised premises which are now painted, and colour all the ceilings of the  
rooms and passages in a proper manner. And will, at the expiration of the  
tenancy, leave and deliver up possession of the same in such repair unto the  
lessors or as they direct; together with all chimney-pieces, stoves, windows,  
doors, fastenings, partitions, locks, keys, and all other fixtures, matters,  
and things which, at the time of the entry of the lessee on the premises,  
shall be found thereon, or which, at any time during the tenancy shall be  
added to and so fastened upon the premises by the lessee,            executors,  
administrators, or assigns as that the same cannot be removed without  
damage or injury thereto. The lessee,            executors, administrators, and  
assigns will not without in every case the written consent of the lessors, pull  
down or alter or in any manner interfere with the construction or arrange-  
ment of the premises, or cut, alter, or injure any of the walls, timbers, or  
floors of the premises, or in any manner deface or disfigure the walls or ceilings  
thereof, or convert into, or use, or occupy the premises, or any part thereof, as a  
shop or warehouse, or for any unlawful or immoral purpose, or for any purpose  
other than purposes proper for residential, professional, or official chambers, or  
without the previous consent of the lessors affix any board, placard, or notice

upon any external part of the premises, or in any of the windows thereof, or have or deposit any offensive goods or materials on the said premises, or permit any of such things to be done. The lessee, executors, administrators, or assigns will not without such consent assign, underlet, or part with the possession of the premises, or any part thereof, or any interest therein. The lessors, or their agents, shall at all times during the term hereby granted have liberty to enter upon the said premises for the purpose of painting the outside wood and ironwork thereof, and may at all seasonable times enter and view the premises and examine the condition and use made thereof, and give notice of defects, wants of repair, and misuser, all of which shall be amended and corrected within one calendar month after such notice, but nevertheless without prejudice to any other right or remedy in respect thereof, and nothing shall be done or allowed in, upon, or with respect to the premises which may annoy, or tend to the annoyance of, the lessors or of any of the other tenants or occupiers of any part of the Westminster Chambers, or which may injure, or tend to injure, the character thereof as a place for residential, professional, or official chambers. In case of non-payment of the rent within twenty-one days after becoming due, and demand made thereof, or on breach of any of the foregoing stipulations and articles, or on the bankruptcy of the lessee, executors, administrators, or assigns, the lessors may without any previous notice re-enter and resume possession of the premises, and put out all persons therefrom, but without prejudice to any right or remedy for any such non-payment or breach. In witness whereof the parties hereto have set their hands the day and year first above written.

Memorandum. The premises are taken by the lessee subject to the regulations made by the lessors with respect to the duties of the porter, the supply of coal, and other matters for the general convenience of the tenants. These regulations are set forth in the schedule to this agreement, and are to be considered as forming part thereof. The lessors, however, reserve to themselves the right of altering and modifying these regulations from time to time as circumstances may in their judgment render desirable.

The Schedule referred to.

The Regulations.—Memorandum of regulations made by the directors in respect of supply of coals, cleaning rooms, &c. :—

There are seven entrances to the building, and the care of each entrance, and the rooms connected therewith, will be in the charge of a resident porter appointed and removeable by the directors, but who shall be, and act as, the servant of the lessee.

There are duplicate keys to the outer door of every set of chambers, one of which is to be always in the hands of the porter, the other in the personal care of the tenant while the rooms are in use.

The tenants have the right to the general services of the porter within the scope of his general duties, as hereinafter defined.

Tenants have the right to the special services of the porter as hereinafter defined upon the terms hereinafter mentioned.

Coals are to be supplied by the lessors at a charge per measure of 900 cubic inches, fluctuating according to the market price paid; and gas is brought to the entrance of each set of rooms, and may be laid on by the tenants at their own expense if desired.

Tenants are not to have stores of coals in their rooms.

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The general duties of the porter, and which are to be performed free of extra charge to the tenants, are as follows :

To be constantly in attendance in the section of the building committed to his charge, either by himself, or in his temporary absence, by some trustworthy assistant.

To cleanse every morning before 9 o'clock a.m. the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein.

To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants for safe custody on their leaving for the night.

To attend to the regular and proper supply of coals to the several apartments.

The special services of the porter which he is bound to render to the several tenants, if required, at a charge of 1s. 6d. per week for each room, comprise the cleansing and arrangement of each such room, and the lighting of the several fires whenever required.

Any extra services required of the porter by the tenants, and which are not inconsistent with his general duties, are to be subjects of special arrangement between them.

Any services, whether special or extra, so rendered by the porter, will be rendered as the servant of the tenant, and for which, or the consequences whereof, the association will not be responsible.

June 3. *Sir R. Baggallay, A.G. (Pinder with him)*, for the Crown, relied on rule 6 of schedule B of 48 Geo. 3, c. 55, and contended: 1. That the entire buildings of the Westminster Chambers are properly assessed to the inhabited house duty as 7 separate dwelling-houses in accordance with the decision of Keating and Hannen, JJ., in 1870. 2. That s. 45 of the Valuation (Metropolis) Act, 1869, having declared the valuation list in force for the time being to be conclusive evidence of the annual value of the several hereditaments included therein for the purpose of the Inhabited House Duty Acts, the commissioners were right in taking the aggregate annual value of the 117 hereditaments, as the aggregate annual value of the 7 blocks, and charging the association with duty accordingly. 3. That in the event of its being held that no one of the 7 blocks is valued in the valuation list as a separate hereditament within the meaning of s. 76 of the Metropolis Valuation Act, 1869, the property in question is still to be assessed as 7 blocks, and the value to be ascertained by the commissioners as if that Act had not passed.

*Giffard, Q.C. (Poland with him)*, for the defendants, contended: 1. That the property is not properly assessed to the Inhabited

House Duty as 7 dwelling houses only. 2. That each of the 117 sets of chambers is a separate and distinct house, and ought if inhabited to be separately assessed in accordance with the decision of the Court of Queen's Bench in 1870. 3. That the property comes under rule 14, and not under rule 6, of schedule B of 48 Geo. 3, c. 55. 4. That the valuation list prepared under 32 & 33 Vict. c. 67, which values and assesses each set of chambers separately, and treats the tenants of the association as the occupiers thereof respectively, is binding upon the commissioners of assessed taxes. 5. That if the property is properly assessed as 7 houses for house duty the value of each of the 7 houses is not properly represented by the aggregate sum of the values which appear in the valuation list as those of the separate hereditaments in each house, and that, the commissioners ought to make a separate valuation of each house under s. 76 of 32 & 33 Vict. c. 67.

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*Cur. adv. vult.*

July 7. The following judgments were delivered:—

CLEASBY, B. The question is, what is the position of these houses in applying the statute 48 Geo. 3, c. 55, and whether the case comes within rule 6 or rule 14 in schedule B? It must come within one or the other, and in that way it has been argued. We are to construe 48 Geo. 3, c. 55. No assistance can be derived from the statute 32 & 33 Vict. c. 67. It would lead to monstrous conclusions if there was to be one construction of the statute from 1808 to 1869 (sixty-one years), and the construction was to be changed by an argument derived from the language of an Act then passed alio intuitu, and which provides for the mode of getting at the amount of assessment. In reality this question has arisen in consequence of a difficulty in applying all the provisions of the latter Act, but that is no reason for varying the construction of the former Act, and the difficulty could be removed by legislation.

The question is, whether the several tenements or suites of rooms in each block are to be regarded as let to tenants so as to come within rule 6, or as being distinct properties so as to come within rule 14? I do not think that rule 4 affords the least assistance. It provides expressly for a defined exceptional case,

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and has no application direct or indirect to other cases. In the particular cases of chambers at the inns of court or the universities each set of chambers is made one house, and the reason is that there is nothing whatever to give them collectively the character of one house, no common outer door, no person residing for common purposes, and no element of common occupancy.

In the present case each block undoubtedly forms one house, and this was not disputed, but the question was, is it to be assessed under rule 6 or rule 14? This makes the decision in *Reg. v. St. George's Union* (1) not applicable. The only question there was, whether there was a separate possession of the Chambers under the agreements: not whether they were let.

I find it impossible to read the terms of the agreements of demise and the regulations without coming to the clear conclusion that in this case the sets of chambers are let in different tenements within rule 6, and are not distinct properties within rule 14. We find more than the usual clauses of tenancy: the tenants cannot commit waste; they cannot assign without licence; they must keep the premises in repair; they cannot in any manner interfere with the construction or arrangement of the premises, they can only use them for specified purposes, viz. office or residential; the landlords may enter and paint the outside, and in case of non-payment of rent or breach of any of the covenants the landlords may re-enter and avoid the lease.

This appears to me to be an unheard-of sort of ownership or distinct property where persons have none of the ordinary rights of ownership, and by the memorandum the lessees are bound by further stringent regulations, which the lessors and, as I should say, the owners, reserve to themselves the right of varying. It is quite a common thing in London for different persons to be the owners of the different stories or flats of one house; it is to that state of things, and not such a case as the present, that the 14th rule applies. For the above reasons I am of opinion that the whole property is properly assessed as 7 dwelling houses.

I also think it follows that the value of each block is accurately represented by the aggregate sum of the values which appear in the valuation list. I should have been glad to escape from this

(1) Law Rep. 7 Q. B. 90.

conclusion by resorting to s. 76 of 32 & 33 Vict. c. 67, but it appeared upon the argument that this was impossible. This inevitable conclusion causes an injustice which ought to be corrected. I think judgment should be given for the Crown.

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BRAMWELL, B. I am of opinion our judgment should be for the Crown. The 48 Geo. 3, c. 55, imposes a duty on inhabited houses. Had it given no rules on the subject, the question would have been whether these blocks, constructed and used as they are, were each one or many "houses" within the Act. To determine this it would be perfectly relevant to inquire what the law had held to be a house in cases of burglary and others; and it may be—I offer no opinion—that possibly each of the separate apartments in each of these blocks would have been held to be a separate house. But the statute has given its own arbitrary definition of what shall and what shall not be a house for the purposes of charging the duty. By rule 1 it enacts the charge shall be on the occupier. By rule 6, when the house is let in different stories, tenements, lodgings, or landings, and inhabited by two or more, the landlord shall be deemed the occupier; but the duties may be levied on any occupier where the landlord is not in the district. I think this includes the present case. Mr. Giffard argues that it applies to cases of lodgers only, persons who have no possession of the rooms as against the landlord, mere licensees who could maintain no action of trespass against him if he came into their rooms. Very unfortunate language has been used, as he admits, if this is so. Rule 6 speaks of a "tenement" "let." I think it does not apply to such cases of lodgers, but to such as the present. I should think so if rule 14 did not exist. But that rule, I think, makes the matter plain. It says that where there is one house divided into different tenements, being distinct properties, they shall be separately assessed. That does not mean distinct properties in the occupier, for that would be true of lodgings. I am not sure it means having distinct owners: it may or may not mean being distinct as one field might be from another. This at least is manifest, that rule 6 supposes there will be one owner or landlord, and rule 14 supposes there may be several.

It is asked why chambers in the inns of court are separately



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assessable if these are not. This is an unfortunate question; because, if rule 6 includes this case, what need was there of rule 4? But the question may be answered. The legislature foresaw trouble and risk to the revenue if each occupier of part of a house was as a rule to be separately charged, and accordingly said that, in that case, the owner of the house should be. It made an exception of chambers in the inns of court because it foresaw there was no such danger as to them, and they might be safely excepted, and it was convenient they should be.

It is said that here the defendants may sell part of the house. I really do not see the bearing of that. They have not so sold. When they do, I think I can tell what ought to be done. But this power to sell part of a house belongs to every owner.

It is said, to hold as I do will be a hardship on the defendants; that one set of chambers may be occupied, the rest empty, and the defendants liable to duty on the whole block. No doubt this is a hardship; but it may well be an intentional hardship, for the security of the revenue. It may well be the legislature determined that, unless a house was uninhabited, it should pay on the whole, and without inquiry how much was empty. This hardship clearly would exist in the case of a house let in lodgings. In support of this opinion is that of Keating and Hannen, JJ., and the intimation of a similar opinion in the Queen's Bench.

As to the second point, I am also of opinion in favour of the Crown. The statute 32 & 33 Vict. c. 67 provides that a general assessment should be made applicable to all rates and taxes. Such an assessment has been made, and must be acted on. For the purpose of the poor-rate it was necessary to assess each set of chambers separately; for the purpose of this tax it is necessary to add up the sums so separately assessed. It is said this is hard, for that a less value will be charged to the poor-rate than to the house-tax. That is the same objection of hardship that I have before disposed of. Uninhabited parts of a house are included in the value when there are inhabited parts. The house is assessed on its letting value.

KELLY, C.B. The real and substantial question in this case is in effect whether each suite of rooms, or set of chambers, in these

houses or buildings is to be treated as a separate property, and to be assessed to the house-tax in respect of its annual value, that is to say, its rateable value as distinguished from its gross annual value, or whether the whole block or house is to be assessed as one tenement. It cannot be denied that the case may be brought within the words of either the 6th rule or the 14th in 48 Geo. 3, c. 55, sch. B; but when we look carefully and critically to the language of these two rules, and consider it with reference to the character or description of these tenements, the language of the 6th rule will be found to be applicable rather to lodgings than to chambers, while the language of the 14th seems to point rather to chambers than to lodgings. The words in the 6th rule are "different stories, tenements, lodgings, or landings." In the 14th the words are, "different tenements being distinct properties;" the word "tenements" therefore being common to both rules.

What, then, is the description given in the case of the sets of rooms in question? They are described expressly as "different" tenements or sets of rooms, which are quite distinct from each other, like chambers in the inns of court, and they are let and are occupied, and are in every instance capable of being let and occupied separately as chambers, offices, or residences; each has an open door opening on to a staircase common to all, and also an inner private hall or passage," and other conveniences. "There is no means of communication between these tenements or suites of rooms other than a staircase common to all; nearly all are let and used as offices or chambers for business purposes, and are locked and unoccupied during the night. A few only are used as residences."

Now every word of this description from beginning to end is strictly applicable to and indeed identical with the sets of chambers in the inns of court, and we find by the 4th rule that these chambers in the inns of court are charged as entire houses or separate properties. Why, then, should the legislature have treated the chambers in the inns of court as separate properties, and not have dealt in the same way with the chambers in the buildings in question, which are in character and description identical with those of the inns of court? But when we find that, by the Westminster Improvement Act, the commissioners may not

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only demise, but actually sell any of these sets of apartments separately from the rest of the house, how can it be said that they are not in every respect separate properties, whether they happen to have been let or remain unlet, or have been sold out and out and become the property of other proprietors? The nature and description of these properties, and whether they are to be deemed lodgings, or in the nature of lodgings, under the 6th rule, or tenements being distinct properties under the 14th, surely cannot depend upon the accident whether they are let or unlet, or are actually sold.

But the mode in which the assessment in this case has been made seems to me conclusive that the legislature intended them to be deemed separate properties, and that the greatest injustice would be done, and indeed has been done, by the assessment in question, if each block with all the sets of chambers within it is to be deemed for the purpose of the assessment a single property. For it appears when we look to the assessment itself, each set of chambers is set down separately with its gross value set against it in another column, and the gross annual value of those which are unlet is apparently the same as that of those which are actually let and occupied by tenants, and the association or company are taxed or assessed, not in respect of what is the real value to them, that is, the net annual value of the aggregate of all those sets of chambers which are actually let and yield to them each a substantial rent, but in respect of the aggregate of the whole number of these sets of chambers, those which are unlet and yield no rent at all at the same amount or ratio as those which are let to tenants who pay to the association a rent. The consequence is, that they are actually charged with the duties, the amount of which is computed at the estimated net value of each tenement, and have therefore to pay the same amount of duty in respect of all that are unlet, and which are therefore of no annual value to them at all, as for the others which yield each an annual rent. Hence, supposing that one of these blocks contains twenty sets of chambers, ten of which are let for 120*l.* a year each, the gross rental being 120*l.*, and the rateable or net rental being 100*l.* a year, and the ten remaining sets of chambers are unlet and yield during the whole year no rental at all, the association are taxed in respect of

the net or rateable annual amount of 2000*l.* a year, whereas the real or actual net rental amounts to but 1000*l.* a year: in other words, they pay a tax upon 2000*l.* for property from which they derive only 1000*l.* per annum. We have only to suppose the case of one single set of chambers, and no more, being let at 120*l.* a year, and nineteen sets of chambers unlet and so yielding no rent at all, and if the assessment were made out as the assessment is in the present case, the association would be taxed in respect of 2000*l.* a year, whereas they would derive only 100*l.* a year from the property. This cannot, I think, have been the intention of the legislature.

I am therefore of opinion that these sets of chambers should be deemed separate properties within the 14th rule, and that the company should be assessed upon the real or actual net or rateable value of each set of chambers, as well as for the apartments, whatever they may be, which are occupied by their servant described in the agreements and memoranda as the resident porter. The Crown will thus be entitled to an amount of duties computed upon the real and actual value of the property taxed; whereas, upon the construction contended for on the part of the Crown, I see no escape from the consequences which I have pointed out, that if a tenth or a twentieth of the whole of the block and no more were let and yielded a rent, the Crown would levy, and the association would be liable to pay, a tax computed upon ten or twenty times the real value of the property. It may be said that this error in the amount of the assessment may be corrected by a different mode of valuation, and this is true; but whatever process of valuation is resorted to, if the construction put upon the rules be wrong, the tax is imposed upon the wrong persons, inasmuch as, if these are separate properties within the 14th rule, the occupiers and not the owners are liable to the duties.

It appears to me also that, as these sets of chambers, whether merely let or actually sold, are occupied in all respects as distinct properties separate from and not in any way connected with each other, exactly as the chambers in the Inns of Court, it would be an anomalous and inconsistent mode of taxation to impose the tax which is universally considered a tenant's tax, not upon the occupier, but the owner.

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I do not refer to the decision of the two learned judges relied upon by the Crown, because it is unaccompanied by any reasons and unexplained by anything to be found in the report. Nor do I rely upon the case in the Queen's Bench, because it is decided upon a different Act of Parliament, though it is impossible to deny that there is much in the language of all the judges tending to support the view which I have taken of this case.

*Judgment for the Crown.*

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for defendants: *Burchells.*

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June 3.

RUSBY, SURVEYOR OF TAXES, APPELLANT; NEWSON, RESPONDENT.

*Inland Revenue—Inhabited House Duties—Exemption in Favour of Buildings occupied for Trade only—Parts of Buildings occupied for Trade—57 Geo. 3, c. 25, s. 1—32 & 33 Vict. c. 14, s. 11.*

The premises known as Weaver's Hall, in the city of London, were occupied by accountants, solicitors and scriveners, merchants, a wine shipper, and a shorthand writer, all of whom used their respective rooms as offices, and by the house-keeper and his family who resided in the top story rent free. The premises having been assessed to the inhabited house duty, the commissioners discharged the assessment on the ground that the premises were entitled to the exemption granted by 32 & 33 Vict. c. 14, s. 11, since the greater portion of them was occupied for the purposes of trade:—

*Held*, on appeal, that the premises were not exempt on that ground.

*Held*, also, by Bramwell and Cleasby, BB., that in assessing the premises no abatement could be made, under 32 & 33 Vict. c. 14, s. 11, in respect of those parts which were occupied for the purposes of trade only.

CASE stated for the opinion of the Court, under Part 3 of 37 & 38 Vict. c. 16, s. 9.

At a meeting of the commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the city of London, held on the 8th of October, 1874, for the purpose of hearing appeals, Newson, the respondent (1), appealed against an assessment to the inhabited house duties for the year ending the 5th of April, 1873, upon the premises known as the Weaver's Hall, No. 70, Basinghall Street,

(1) Newson's interest in the premises was not stated.

in the ward of Bassishaw, and contended that the premises were exempt under 32 & 33 Vict. c. 14, s. 11, upon the ground that they were occupied as offices and counting-houses for merchants and professional men, except the two rooms occupied by the housekeeper and his family, who lived on the premises solely for the protection thereof.

The premises are occupied by four accountants (1), all of whom use the rooms they respectively occupy as offices, and by the housekeeper, his wife and two children, and a servant, who occupy two rooms on the top story as a residence rent free. The housekeeper and his wife are employed by the various occupiers to clean the offices, for which they are remunerated by them.

Rusby, the surveyor, contended that as the premises were partially occupied by solicitors and other professional men, they were not used solely for trade, and were therefore liable to inhabited house duty. He also referred the commissioners to the Judges' case, 2848, respecting the assessment on the same premises for the year 1869, ending April, 1870, when they were held to be liable, and the appellant admitted that the facts of the case in the years 1869-1870, and 1872-1873, were identical.

The commissioners discharged the assessment, on the ground that the greater portion of the premises were occupied for the purposes of trade, whereupon the surveyor for the Crown declared his dissatisfaction with their decision, and duly required them to state and sign a case for the opinion of this Court, which they accordingly did.

*Sir R. Baggallay, A.G.* (*Pinder* with him), for the appellant. The duties were imposed by 48 Geo. 3, c. 55, schedule B, and 14 & 15 Vict. c. 36, s. 2. An exemption was granted by 57 Geo. 3, c. 25, s. 1 (2), and that exemption was extended by 32 & 33 Vict.

(1) As to this see pp. 324, 326.

(2) 57 Geo. 3, c. 25, s. 1, after reciting that duties on inhabited houses were granted by 48 Geo. 3, c. 55, sch. B, says:—"And whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-

houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only for the purposes of such trades respectively which have been

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c. 14, s. 11. To bring himself within s. 11, the respondent must shew that the whole of the house was occupied for trade only, or "as a warehouse," &c., and he cannot do that, for it is impossible to contend that attorneys or short-hand writers carry on a "trade." In the case of *The Edinburgh Life Assurance Company* the Court of Exchequer in Scotland decided, on February 2, 1875, that an Assurance Company does not occupy "for the purpose of trade," within 32 & 33 Vict. c. 14, s. 11. It being then clear that part of Weaver's Hall is not so occupied, the Crown is entitled to judgment.

[After some discussion, *Finlay*, for the respondent, admitted that the whole of Weaver's Hall was not occupied for "trade" only, but desired to argue that, in assessing the whole, an abatement ought to be made in respect of such parts as were occupied for trade only, or as a warehouse, &c. *Sir R. Baggallay* agreed

charged with the said recited duties, although no person shall inhabit or dwell therein in the night-time, and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned, Be it therefore enacted . . . that from and after the 5th day of April, 1817, on due proof made in the manner herein directed to the satisfaction of the respective commissioners acting in, the execution of the said recited Act, that any person or any number of persons in partnership together respectively occupy a tenement or building, or part of a tenement or building, which shall have previously been occupied for the purpose of residence wholly, as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the daytime only, for the purpose of such trade, such person, or each of such persons in partnership,

respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for the purposes of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, anything in the said Act to the contrary notwithstanding."

32 & 33 Vict. c. 14, s. 11, enacts that "from and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

that this question should be decided by the Court, though it was not specifically raised by the case.]

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*Finlay* (Day, Q.C., with him), for the respondent. It is conceded that the building is liable to be assessed for some amount of duty; but it is contended, first, the assessment is wrong, because the parts occupied for other purposes than trade ought to have been separately assessed under 48 Geo. 3, c. 55, schedule B, rule 14, as has been here contended this day in *Attorney General v. Mutual Tontine Westminster Chambers Association, Limited*. (1)

[BRAMWELL, B. You cannot argue that point; it is not raised by the case.]

Then, secondly, the assessment is wrong, because no abatement is allowed for those parts which are occupied for the purposes of trade only. It would be monstrous if, because out of twenty-one persons who occupy Weaver's Hall, two or three occupy for other purposes than trade, the whole building should be assessed upon its full value. Such a construction gives no meaning to the words "part of a tenement," in 32 & 33 Vict. c. 14, s. 11. That Act was designed to extend, not to contract the exemption granted by 57 Geo. 3, c. 25, s. 1, which enacts that on proof that any person occupies a tenement or building, or part of a tenement or building, "the commissioners may discharge the assessment in respect of such tenement or building." There is nothing in either statute implying that, in order to claim the exemption, the "part of a building" must be separately assessed.

KELLY, C.B. It appears to me that this case does not raise the question whether some portion of Weaver's Hall, which has been assessed to this tax, is not by law exempted from assessment; and even if it be supposed that it is raised, still there is no statement in the case which enables me to determine whether the assessment now complained of is in respect of the value or rental of that portion which is so exempted from assessment, or only in respect of the value or rental of the portion which is undoubtedly liable to assessment. Under these circumstances, and lamenting much that the case has come in such a form, I am of opinion that, as it is perfectly clear that this building is liable to some assessment—

(1) Ante, p. 305.



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whether for the entire amount of the assessment or some part I cannot say—I am content to give judgment for the Crown.

BRAMWELL, B. I really think that this case states every necessary fact, and raises every question on which it is necessary for us to express an opinion. It does not raise the point which Mr. Finlay would like to have argued, which is, that there should be a separate assessment upon each of these merchants, attorneys, short-hand writers, and others, and it ought not to raise it, because that is an after-thought; but the real question that it does raise is that on which Mr. Finlay has in fact admitted that he cannot maintain his contention, viz. the question whether the house is used only for the purposes of trade, or any other of the things mentioned in the Act. He admits that the attorney and the short-hand writer use their chambers for purposes other than trade. Then the house is not used for purposes of trade only.

Then can he make any use of this expression in 32 & 33 Vict. c. 14, s. 11, "Any tenement or part of a tenement occupied as a house for the purposes of trade only?" Mr. Finlay suggests that he can, in this wise: that these words, when coupled with the following words, "shall be exempt from inhabited house duties," can only be explained by supposing that the house is to be assessed by the commissioners, with an abatement for that part which is occupied for the purposes of trade. That is what I understand to be the argument briefly put. I think it is erroneous and indefensible. I think that in truth this Act must be read as though the words, "or part of a tenement," were not there. I think they make no alteration in the effect of the Act.

Of course you cannot read these words, "or part of a tenement," without those words which immediately follow, "occupied as a house for the purposes of trade only." It is to be part of a tenement occupied as a house, and that means a part of a tenement which is separately assessable to the house duty, which would come under rule 14 of 48 Geo. 3, c. 55, schedule B, or which in some way or another would be separately assessable. And I am fortified in this conclusion by the words at the end of the section: "although a servant or other person may dwell in such tenement, or part of a tenement, for the protection thereof." If that were to

be read as Mr. Finlay would have us read it, it would read thus :  
 “any room in a house used for purposes of trade only shall be exempt from inhabited house duties, although a person may dwell in that room for the protection thereof.” That clearly was not the intention. The intention was to exempt a house, or a separately assessable tenement, occupied as a house for the purposes of trade only, although somebody slept in it.

I think one can find a justification for this conclusion in 57 Geo. 3, c. 25. That Act begins by reciting what would be very favourable to Mr. Finlay’s argument, if you looked at that alone. It recites in s. 1, that it has become very customary for people either separately or in partnership, “to occupy a dwelling house or dwelling houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only.” Surely that recital would comprehend a case where a man had a dwelling house in one place and a room in another house, not separately assessable, for the purpose of his trade. But we must see how it goes on: “and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings as are or shall be solely employed for the purposes herein mentioned. Be it therefore enacted . . . that from and after the 5th of April, 1817, on due proof made . . . that any person or any number of persons in partnership together respectively, occupy a tenement or building, or part of a tenement or building” (still the same words are used) “which shall have previously been occupied for the purpose of residence wholly, as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein except in the daytime only for the purpose of such trade, such person, or each of such persons in partnership respectively, residing in a separate and distinct dwelling house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners according to the provisions of this Act to discharge the assessment made for that year in respect

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of "—what?—" in respect of such tenement or building," the words "part of a tenement," being there dropped. So that it is clear that in this Act the words "part of a tenement" really are equivalent to "a tenement," and it is intended to meet such a case as one which comes within rule 14 of 48 Geo. 3, c. 55, sch. B, and to discharge it. The second section deals with the subject, but I think the words "part of a tenement" do not occur again.

If it is said that our construction is harsh; possibly in one sense it is, but in another sense it clearly is not. The legislature had said originally, that all inhabited houses should be subject to the duty, and it was held—properly, no doubt—that a house which was not occupied at night, but was occupied in the daytime for the purposes of trade, was an inhabited house and subject to duty. Very likely it was pointed out that that was in truth taxing the instruments of trade, and perhaps was as injudicious as a tax upon machinery, or tools, or other means by which trade was carried on; and thereupon the legislature thought that it was reasonable to exempt buildings which were solely used for purposes of trade and for the other purposes mentioned. But, at the same time, they did not exempt parts of buildings that were used for such purposes where other parts were not so used, because they could not go into nice distinctions as to the loss of revenue that might be sustained if the question could be raised as to one part of the house being used as a dwelling-house and other parts for the purposes of trade only. Then 32 & 33 Vict. c. 14, s. 11, determined upon a further liberality to persons carrying on trade, and said that what had before been true of a house where nobody dwelt at night should be true of it although persons for its protection dwelt and slept there. Therefore in one sense there is no hardship or injustice in the terms of s. 11; it is simply extending a boon which had been conferred before.

It may be expedient in such a case as this that the legislature should say that in assessing a house partly used for the purposes of trade and partly used for other purposes, the commissioners should make allowance for the value of that part of the house which was used for the purposes of trade only. I do not say that that would not be a very reasonable thing. The Attorney General seems to

think it would be, and I confess I rather think so too, provided there was no danger to the revenue. Whether there would be or not, I cannot say; but we have got nothing to do with such considerations as those of hardship, except this, that no doubt when a case of hardship is pointed out in a statute it makes the construction which leads to it more improbable than if it led to a reasonable and just condition of things. But in my mind the construction of this statute is plain; and the Crown is entitled to judgment, that Weavers' Hall should be assessed to its full value as a house, without any abatement in respect of those parts that are occupied for the purposes of trade only.

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CLEASBY, B. I am of the same opinion. The facts here are precisely the same as in the case No. 2848, and the question is the same; but the commissioners thought proper, because the greater part of the building is occupied for the purposes of trade, to make that a reason for exemption. They were not justified in doing that.

Upon the case generally, it appears to me tolerably clear that the exemption does not apply, except where it applies to the subject-matter of assessment. There is one part of 57 Geo. 3, c. 25, s. 1, on which my Brother Bramwell, perhaps, did not dwell as much as it deserves. After the recital that a person may dwell in one house and at the same time occupy "one or more separate and distinct tenements or buildings, or parts of tenements or buildings for the purposes of trade," &c., come the words which I think so important here,—“which have been charged with the said recited duties.” I can only read these words as meaning that parts of tenements so occupied for the purposes of trade have been charged with the said recited duties, because it goes on, “although no person shall inhabit or dwell therein in the night time.” In what? In the part of a tenement. Of course the very words point to the fact that although no person dwelt therein in the night time, still the part had been charged. The whole of this section seems to point clearly to this, that whereas formerly the exemption had only been where no person dwelt therein during the night time, the exemption is to be carried further. It shall make no difference whether a person does dwell and sleep therein at night time, pro-



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vided the occupation be such as is mentioned. I think that "tenement" and "part of a tenement" have the same meaning, and therefore that the decision of the commissioners was wrong.

*Judgment for the appellant.*

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for respondent: *Flower & Nussey.*

June 24.

PATTINSON v. LUCKLEY.

*Contract—Alteration of Written Contract in material Part—Erasure in Written Contract—Action on a quantum meruit.*

The plaintiff was employed by the defendant to erect buildings on the defendant's land upon written conditions, which, after being signed, were kept on the defendant's behalf by his architect. One of the conditions made the architect's certificate a condition precedent to the right to payment. The plaintiff having been paid for all the works for which the architect had certified, sued upon a quantum meruit in respect of works for which no certificate had been given. The defendant, in answer, set up the conditions, in which appeared an erasure in a material part. The jury having found that the erasure was made by the architect after the plaintiff had signed, the plaintiff contended that the document was void, and that he might sue on a quantum meruit:—

*Held*, that, notwithstanding the erasure, the conditions were either still the governing document, or at least must be looked at to see what were the real terms of the contract; and that the plaintiff could not recover.

THE action was brought to recover about 370*l.*, the balance of a builder's account.

The declaration contained the common money counts for goods sold, work done, &c., money paid, money received, and money due on an award, and on accounts stated.

The defendant paid money into Court, and pleaded never indebted as to the residue. Issue thereon. (1)

At the trial before Field, J., at the Newcastle Spring Assizes, 1875, the plaintiff proved that in 1872 he erected buildings on the defendant's land at his request. During the progress of the

(1) The declaration contained also three special counts which are not material to this report, since the learned judge at the trial ruled, and the plaintiff's counsel admitted, that there was no evidence in support of them.

works the plaintiff and defendant signed a document partly printed and partly written, which had been prepared by the defendant's architect, and contained the conditions upon which the buildings were to be erected and paid for. This document was kept by the architect after the plaintiff had signed it. When produced in Court, it was found that in the eighth condition, which provided that no charges should be allowed for extra works for which written orders had not been given by the architect or clerk of the works, there had been an erasure. The plaintiff swore that when he signed the document the words were to the effect that written orders would not be required for extra works, and that these words had been erased after he had signed, and without his knowledge. The architect being called for the defence, swore that the document had not been altered since the plaintiff signed it; and that the only words erased were to the effect that written orders for extras should be countersigned by the proprietor, and that these words had been erased before the plaintiff signed, and at his request. Part of the balance now sued for was in respect of extra works for which no written orders had been given, but which the plaintiff said had been executed with the defendant's approval. One of the conditions made the certificate of the architect a condition precedent to the right to any payment, and the plaintiff's counsel admitted that the architect's certificate had not been obtained for the works which were the subject of this action; that the plaintiff had been paid for all the works for which the architect had given a certificate, and therefore could not sue upon the conditions; but contended that the document, after execution, had been altered in a material part by the defendant's agent, the architect, who had the custody of it; that it was therefore void, and that the plaintiff could sue upon a quantum meruit. In answer to questions put by Field, J., the jury found that the words erased were that written orders should not be required for extra works, and that they were erased by the architect after the plaintiff had signed the conditions. Field, J., thereupon entered the verdict for the plaintiff, subject to a reference to an arbitrator as to the amount, reserving leave generally to the defendant to move to enter the verdict for him.

A rule nisi having accordingly been obtained to enter a nonsuit or a verdict for the defendant, on the ground that, notwithstanding

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the erasure or alteration in the contract alleged by the plaintiff and found by the jury, the plaintiff was not entitled to recover, or for a new trial on the ground that the verdict was against the weight of the evidence,

*Herschell, Q.C.*, and *G. Bruce*, for the plaintiff, shewed cause. The instrument containing the conditions having been altered in a material part on the defendant's behalf and for his benefit by the architect who had the custody of it, it is the same as if the defendant had himself made the alteration, and he is precluded from setting up the instrument against the plaintiff, or taking advantage of it in any way whatever; as regards him it is void, or is as if it did not exist: *Pigot's Case* (1); *Powell v. Divett* (2); *Aldous v. Cornwell* (3); *Davidson v. Cooper* (4) (as to alteration by a stranger).

[CLEASBY, B., referred to *Croockewit v. Fletcher*. (5)]

See also *Burchfield v. Moore* (6); and the notes to *Master v. Miller*. (7) The plaintiff can, therefore, sue on a quantum meruit.

[BRAMWELL, B. Is not the plaintiff in this difficulty? He has built a house upon the defendant's land, which will belong to the defendant unless the plaintiff can prove a contract to pay him for it?]

He proves the contract by shewing that the works were done at the defendant's request.

[After hearing the argument upon the evidence, and examining the instrument containing the conditions, the Court said they were prepared to make the rule absolute for a new trial, on the ground that the verdict was against the weight of evidence, but]

*R. G. Williams, Q.C.*, and *John Edge*, for the defendant, contended that he was entitled to enter the verdict; because, though the instrument was so far vitiated that the defendant could not have sued upon it as an executory contract, it was still the instrument governing the contract, or at least must be looked at to see what the terms were before the plaintiff could recover,

(1) 11 Co. Rep. 26 b.

(2) 15 East, 29.

(3) Law Rep. 3 Q. B. 573.

(4) 11 M. & W. 778; on appeal,  
13 M. & W. 343.

(5) 1 H. & N. 893; 26 L. J. (Ex.)

153.

(6) 3 E. & B. 683; 23 L. J. (N.S.),

Q. B. 261.

(7) 1 Sm. L. C. 871, 7th ed.

and the plaintiff having failed to comply with those terms could not maintain this action; and they relied on *Earl of Falmouth v. Roberts* (1), where the defendant became tenant to the plaintiff of a farm from year to year by parol, but afterwards signed an agreement containing certain stipulations as to the mode of tillage. In an action by the landlord for breaches of these stipulations, the agreement, on being produced, contained an erasure in the term of years mentioned in the habendum, which was altered from seven to fourteen. Held, that the agreement might be received in evidence without any explanation of the erasure, the term of years being immaterial to the parol contract. Parke, B., there said, during the argument, "The general rule undoubtedly is, that where there appears to be an alteration in the document, it lies upon the party producing it to explain it. . . . The rule of law applies where the obligation is by reason of the instrument: here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year; as to which an alteration in the term of years is wholly immaterial." [They also cited *Fazakerly v. McKnight* (2); *The Mercantile Bank v. Gladstone* (3); and *Smidt v. Tiden*. (4)]

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BRAMWELL, B. The rule must be absolute. It is remarkable that there is no authority on the point, but on principle I think our judgment should be for the defendant. We must assume that the verdict was correct, that the document was altered after execution without the consent of the plaintiff, and upon the authorities I think we must hold that the defendant was as responsible for the alteration as if he had made it himself, since it was made by the person who was holding the document for the defendant and for his benefit.

The question is not what the defendant could do against the plaintiff—not what the defendant's rights are. It may be that, if

(1) 9 M. &amp; W. 469, 471.

(3) Law Rep. 3 Ex. 233.

(2) 6 E. &amp; B. 795; 26 L. J. (Q.B.)

(4) Law Rep. 9 Q. B. 446.



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the plaintiff had done none of the work, and the defendant had sought to enforce the contract after having spoiled the document, on the authority of *Powell v. Divett* (1) he would have been unable to enforce the contract; or that, if the plaintiff had done the work badly, the defendant could not have enforced the contract by an action for bad building. I give no opinion on that question; if it were necessary to decide it, I should desire further time for consideration. But the question we must decide is, on what terms the plaintiff is entitled to be paid. I am strongly inclined to think that he is entitled to be paid on the terms actually agreed on. If he fails to shew any bargain, he is not entitled to be paid at all. In the case of goods sold and delivered, it is easy to shew a contract from the retention of the goods; but that is not so where work is done on real property; and the plaintiff, therefore, in shewing what the bargain was, must shew all the terms. It is of no use to answer, as Mr. Herschell did, that he has made out a *primâ facie* case by telling half the truth. We must have the whole truth. I doubt, therefore, if the document has been so spoiled as not to be still the intrinsically governing document—because, if not, there are innumerable difficulties. Suppose the claim on the quantum meruit were to the plaintiff's detriment, instead of being to his advantage, would he be deprived of his right to sue on the contract? Surely not. Then, has he an option to sue on a quantum meruit or on the document at his pleasure? No doubt there are cases where a man may so conduct himself as to give an option, but they do not apply here. The question is, what was the contract? Not what is it the plaintiff's pleasure to say the contract was.

Again, suppose the contract were by deed, and the deed were so mutilated as not to be binding, would the plaintiff lose the benefit of the contract being by deed, and lose his right of action for a debt after the expiration of six years? I doubt it. So, if the seals were cut off a deed by which an estate passed, the estate would not revest in the grantor. (2)

All these considerations tend to shew that where a person

(1) 15 East, 29.

47, cited in the notes to *Master v.*

(2) See *West v. Steward*, 14 M. & W. *Miller*, 1 Sm. L. C. 919, 7th ed.

claiming to be paid for work did the work under an instrument of contract, that instrument, though altered in a material part, is still the governing document to determine the rights of the plaintiff.

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But if I am wrong, and the instrument is not intrinsically binding, still I think it may be looked at to see the terms of the contract. Upon this point the case of *Earl of Falmouth v. Roberts* (1) is material, and the observations of Parke, B., are of great value in shewing what our conclusion ought to be; that even if we hold that the instrument ceased to have any intrinsic operation, still we must look at it to see the terms of the bargain. The plaintiff, therefore, must make out his case in accordance with those terms. But it is admitted that he has been paid for all works for which the architect has certified, and that if he is bound by the terms of the conditions which make the architect's certificate a condition precedent to the right to payment, the verdict is wrong. I think that he is bound by those conditions, and that the rule must therefore be absolute to enter the verdict for the defendant.

The defendant is also entitled to have the question reserved as to a new trial on the ground that the verdict was against the weight of the evidence, in the event of our decision on the point of law being reversed in the Court of Appeal. There are precedents for this course in several cases within my own knowledge.

CLEASBY, B. I am of the same opinion. It is not intended to overrule or qualify any of the decisions as to the effect of altering a written contract. There is sound reason for abiding by the principle of those decisions. But we must see how the principle is evoked before applying the general rule which prevents a person from setting up a contract for his own benefit if he has altered it. The contract remains: the disability is on the person who has altered it: it would be ridiculous to suppose that his act has destroyed the rights of others. We must look at the nature of the case. This is not a contract to pay a sum of money or do one thing, but an agreement operating over twelve months

(1) 9 M. & W. at p. 471.

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or more. It is to be acted on from time to time, and as it has been acted on, it is impossible to say one can undo what has been done, and that payments can be recovered back, and that the agreement ceased to be operative while it was being acted on and treated as binding by both parties. That is a satisfactory ground on which to rest our decision.

POLLOCK, B. I am of the same opinion. I agree with that part of the plaintiff's argument which goes to shew that the alteration was material, and that the general rule applies that the defendant could not ask us to give effect to the contract as a binding executory contract. But that is not the defendant's proposition. Mr. Herschell went further, and said the defendant could not take advantage of the contract, and that it was as if the written contract had never existed. The true rule is laid down by Parke, B. in *Earl of Falmouth v. Roberts*. (1) We are asked to infer another contract, shutting out what we know occurred, and what was the essence of the contract. By our decision we are carrying out substantially the real contract.

*Rule absolute.*

Attorneys for plaintiff: *Pattison, Wigg, & Co., for R. S. Hopper, Newcastle.*

Attorney for defendant: *J. Scaife, for Chartres & Youll, Newcastle.*

(1) 9 M. & W. at p. 471.

## [IN THE EXCHEQUER CHAMBER.]

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July 7.

*Negotiable Instrument—Foreign Scrip issued by Agent in England.*

Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment in full of the instalments due from him, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, and which by the usage of bankers and dealers in public securities, is transferred by mere delivery, passes by such delivery to a bonâ fide holder for value without title.

ERROR by the defendants on a judgment of the Court of Exchequer in favour of the plaintiff.

The facts are fully stated in the report of the case in the Court below (ante, p. 76).

May 15; June, 23, 24. *Benjamin, Q.C.* (*Anstie* with him), for the defendants. The scrip in question is not by the law merchant negotiable, and no usage of trade, no consensus of merchants, can make it so: *Crouch v. The Crédit Foncier* (1); *Partridge v. Bank of England* (2); *Dixon v. Bovill*. (3) *Gorgier v. Mieville* (4) does not touch the present case. All that was held there was that the bond sued on must be treated as a foreign promissory note. Suppose that by the usage of foreign nations a contract to deliver goods by instalments was negotiable, this practice could not alter the English law. Secondly, the contract under which the scrip was issued is an English contract; wherever A. makes a contract by his agent, he is there by implication of law. Before the Russian Government issues its bonds the contract relating to them is made in London.

To hold that scrip certificates are not negotiable in the sense contended for would lead to no inconvenience. A traffic in such imperfect and inchoate instruments is not beneficial to commerce. [He cited *Attorney General v. Bouvens* (5); *Thompson v. Dominyn* (6); *Edie v. East India Company*. (7)]

(1) Law Rep. 8 Q. B. 374.

(4) 3 B. &amp; C. 45.

(2) 9 Q. B. 396; 15 L. J. (Q.B.) 395.

(5) 4 M. &amp; W. 171.

(3) 3 Macq. 1.

(6) 14 M. &amp; W. 403.

(7) 2 Burr. 1216.



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ROBARTS.*J. Brown, Q.C. (C. H. Robarts, with him), for the defendants.*

The judgment of the Court below was clearly right. Foreign bonds have repeatedly been held to be negotiable. In the present case it is intended that the scrip shall be the representative of the bond till it is issued, and that the holder shall have the power of pledging or otherwise disposing of it by delivery. The Courts will give effect to the reasonable engagements of a foreign sovereign, in accordance with the usage of trade: *Lang v. Smyth* (1); *Jones v. Peppercorne* (2); *Miller v. Race* (3); *Carvick v. Vickery* (4); *Wookey v. Pole* (5); *Brandao v. Barnett* (6); *Benson v. Chapman*. (7) It was clearly intended that the scrip should be considered as property, and not merely evidence of a contract. It is very doubtful whether there is anything in the scrip certificate from which any contract can be implied on the part of the agent. Credit is given to the foreign government, who are disclosed in the document: *Green v. Kopke* (8); Story on Agency, § 306. The decision of the Court below is founded on the interests of commerce, and is supported by American as well as by English authorities: *Mitchell v. Baring* (9); *Edie v. East India Company* (10); Williams on Executors, 7th ed. vol. i. p. 621; Kent's Comm. vol. 3, 12th ed. p. 89; *White v. Vermont Ry. Co.* (11); *Brainerd v. New York and Harlem Ry. Co.* (12); *National Exchange Bank v. Hartford R. R. Co.* (13)

*Benjamin, Q.C.*, in reply, cited *Glover v. Persigny* (14); *Lloyd v. Guibert*. (15)

*Cur. adv. vult.*

July 7. The judgment of the Court (Cockburn, C.J., Mellor, Lush, Brett, and Lindley, JJ.) was delivered by

COCKBURN, C.J. The question for our decision in this case is whether certain scrip issued by the authority of the Russian Government, and certain other scrip issued by the authority of the

(1) 7 Bing. 284.

(2) Johns. 430; 28 L. J. (Ch.) 158.

(3) 1 Sm. L. C. 5th ed. 450, 459.

(4) 2 Dougl. 653.

(5) 4 B. & Ald. 1, 18.

(6) 12 Cl. & F. 787, 805.

(7) 8 C. B. 967, n.

(8) 18 C. B. 549; 25 L. J. (C.P.) 297.

(9) 4 C. & P. 35.

(10) 2 Burr. 1216.

(11) 21 How. (U.S.) 575.

(12) 11 Smith's N. Y. 496.

(13) 8 Rhode Isld. 375.

(14) 11 Weekly Rep. 146.

(15) Law Rep. 1 Q. B. 115.

Austro-Hungarian Government, is a negotiable security for money, so that the transfer of it by a person not being the true owner to a bonâ fide holder, for value, can confer a good title on the latter.

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The scrip in question was bought by the plaintiff through one Clayton, a stockbroker, and was allowed to remain in Clayton's hands, who unlawfully pledged it with the defendants, who are bankers, as security for a loan of money. Clayton having become bankrupt and having absconded, the defendants sold the scrip at the market price of the day, and the plaintiff brings his action to recover the amount realised on such sale.

The scrip in question was in the following form:—

"1873 . C. 1873. Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in 5 per cent. consolidated bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. de Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st of December, 1873. Scrip for one hundred pounds stock, No. —.

"Received the sum of twenty pounds, being the first instalment of 20 per cent. upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government.

"London, 1st December, 1873. The instalments are to be paid at our office as follows: 15*l.* per cent., or 15*l.*, on the 5th February, 1874; 15*l.* per cent., or 15*l.*, on the 9th of March, 1874; 20*l.* per cent., or 20*l.*, on the 2nd May, 1874; 23*l.* per cent. or 23*l.*, on the 9th June, 1874. Subscribers may pay the same, under a discount at 3 per cent. per annum, on any Monday or Thursday after the 16th instant.

"In default of payment of these instalments at the proper dates, all previous payments will be liable to forfeiture." Then follow four other receipts for 20*l.* each, making up the 100*l.*, for which the bond is afterwards to be given.

The scrip issued by the authority of the Austro-Hungarian Government was in a precisely similar form.

The scrip in question was issued by Messrs. de Rothschild as the agents of the Russian and Austro-Hungarian governments, they

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being employed by these governments to negotiate and raise a loan for them respectively on government bonds, bearing interest, to be afterwards issued in exchange for the scrip when all the instalments of the sum for which the scrip was issued should have been paid up. No question is raised as to the fact of Messrs. de Rothschild having acted in the matter as agents of the two governments, or of the scrip having been issued by the authority of the latter.

The bonds issued on the last instalment being paid up were, as will be seen on reference to the special case in which they are set out, in conformity with the terms stated in the scrip. It is only necessary to point out that the bond, agreeably to the terms of the scrip, is made payable to bearer.

The 9th paragraph of the special case contains the following statement, upon which, as it appears to us, the decision of the case turns :—

“The scrip of loans to foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and Foreign Stock Exchanges, and through them by the public, for over fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognised by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip. This usage extended alike to scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it.”

The contention on the part of the plaintiff was that, scrip of this description not coming under the category of any of the securities for money which, by the law merchant, are capable of being trans-

ferred by indorsement or delivery—indeed, not being a security for money at all, but only for the future delivery of a bond—the right of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against the owner.

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On the part of the defendants it was contended that the finding as to general usage brought the case within the decisions in *Gorgier v. Mieville* (1) and *Attorney General v. Bouwens*. (2) In the former of these cases a bond of the King of Prussia, payable “to every person who should for the time being be the holder of the bond,” had been, as in the present instance, unlawfully pledged with the defendants in the action, by an agent who had been intrusted with it for the purpose of receiving the interest on it. The owner having brought an action to recover the bond, it was proved on the trial that bonds of this description were sold in the market, and passed from hand to hand daily, like exchequer bills, at a variable price, according to the state of the market. Upon these facts Lord Chief Justice Abbott was clearly of opinion that this bond might be pledged to any person who did not know that the person pledging it was not the real owner, and he directed the jury to find a verdict for the defendants, unless they thought that the defendants knew that Messrs. Agassiz & Co., the pledgors, were not the owners of the bond at the time when they deposited it in their hands. A rule nisi for a new trial, having been obtained, was afterwards discharged. Abbott, C.J., in giving judgment, says: “This instrument in its form is an acknowledgment by the King of Prussia that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it; and the principal and interest is payable in a certain mode and at certain periods mentioned in the bond. It is, therefore, in its nature precisely analogous to a banker’s note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it. It is distinguishable from the case of *Glyn v. Baker* (3), because there it did not appear that India

(1) 3 B. &amp; C. 45.

(2) 4 M. &amp; W. 171.

(3) 13 East, 509.



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bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills."

In *Attorney General v. Bouwens* (1), the question as to the negotiable character of foreign bonds arose in a different form, the question being whether Russian, Danish, and Dutch bonds, of which a testator, dying in this country, was holder at the time of his death, were liable to probate duty. In a special verdict taken at the trial it was expressly found "that the said Russian, Danish, and Dutch bonds respectively were and are, and always have been, marketable securities within this kingdom, and always have been sold and transferred within this kingdom by delivery only, and the bearers thereof have always been deemed and reputed to be, and have always been dealt with as being, legally entitled to the principal moneys secured by the said bonds respectively, and to the interest or dividends from time to time arising or accruing in respect of the same. It never has been nor is it necessary to do or perform any act whatsoever out of the kingdom of England, in order to render a transfer of any of the said bonds valid, and the bearers of the said bonds respectively have always been treated and dealt with by the agents of the empire of Russia, and of the kingdoms of Holland and Denmark, as the persons duly entitled to the principal moneys secured by the said bonds respectively, and the interest or dividends thereof, and such agents have always paid all moneys due and payable for and in respect of the said bonds respectively, according to the tenor and effect thereof to the bearers of the same."

In like manner, in *Heseltine v. Siggers* (2), Spanish bonds were treated as passing by mere delivery.

Strenuous efforts were made by Mr. Benjamin in his able argument on behalf of the plaintiff to distinguish the present case from *Gorgier v. Mieville*. (3) He insisted, first, that although it must be admitted that, if a bond had been given in lieu of this scrip, the bond would have been a negotiable instrument, as the case would then have come within *Gorgier v. Mieville* (3), here there was no

(1) 4 M. & W. 171.

(2) 1 Ex. 856; 18 L. J. (Ex.) 166.

(3) 3 B. & C. 45.

engagement on the part of the foreign government: The only party signing the scrip, or who could be held bound by it, were the Messrs. de Rothschild; and the persons advancing their money, and taking the scrip, could look only to them. Secondly, that even assuming that the issuing of the scrip was to be taken to be the act of the foreign government, yet that as it had been issued in London, and the parties taking it had advanced their money in this country, the contract must be taken to have been made here, and must be subject to the law of England. That when a foreign sovereign negotiated a loan in this country, through his agent, it was in effect the same thing as though such sovereign had himself come to this country and entered into the contract in person. That, consequently, in either view, the contract arising on the scrip must be taken to have been made here, and must be dealt with according to English law. That this being so, the case of *Crouch v. The Crédit Foncier of England* (1), was an authority which established that it was not competent to anyone, by the law of England, to give to a security, not negotiable by the law merchant, the character of negotiability, by making it payable to bearer, even though such security were a security for money. That, a fortiori, this scrip, not being a promise to pay money, but only to give a bond when all the instalments should have been paid up, could not have the character of negotiability given to it by being made payable to bearer. That choses in action not being assignable by the general common law, it was only by the law merchant, which was recognised by the common law and adopted by it, that a particular class of securities for money could be made negotiable, either by indorsement, or by being made payable to bearer; and that this class of securities was confined to bills of exchange, promissory notes, and drafts payable to bearer. That this scrip did not coincide with either of the securities for money to which by the law merchant, the quality of being so rendered negotiable had been conceded; the more so as in fact it was not a security for money at all, but only an agreement to give such a security in the shape of a bond. That the bonds of foreign governments had been held to be negotiable by the Courts of this country, not because they were negotiable by the law of the country in which

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(1) Law Rep. 8 Q. B. 374.

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they were made, but because they were in substance and effect promissory notes.

We entirely dissent from the contention that the contract in question is one in which the Messrs. de Rothschild can be looked upon as principals. And though our decision on that head may not be essential to the conclusion we have arrived at on the case, we think it desirable in a matter in which the public are so much interested that our view should be made known. It is plain on the face of the document that the Messrs. de Rothschild only profess to be acting as the agents of the foreign governments. The law on this subject is correctly laid down in Story on Agency, in the chapter on the Liabilities of Public Agents, s. 302. Collecting the English and American authorities in a note, the learned jurist writes as follows: "In the ordinary course of things, an agent, contracting on behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or, that the party dealing with him in his public character, means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the Government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man, and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconvenience would result from a different doctrine, considering the various public functionaries which the government must employ in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under the government, if they were held personally liable upon all their official contracts. This principle not only applies to simple contracts, both parol and written, but also to instruments under seal, which are executed by agents of the government in their own name, and purport to be made by them on behalf of the government; for the like presumption prevails in such cases,

that the parties contract not personally, but merely officially, within the sphere of their appropriate duties."

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Chancellor Kent lays down the law to the like effect (2nd Commentaries, p. 810, 7th ed.), "There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of government, makes a contract and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn from all the cases, and it is expressly declared in some of them."

It is true these authors are speaking of persons acting as agents for their own governments; but the reasoning applies equally to persons acting as agents for a foreign government, and the same presumption must arise in both cases. Nor can we suppose that the persons taking this scrip did so otherwise than through their faith in the honour of the foreign government, just as they would have had to trust to it on their afterwards receiving the bonds in lieu of the scrip. They would then be equally without legal redress against the foreign government and must have trusted to its honour in the fulfilment of its engagements.

We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract, as we agree in thinking that its negotiable character, if it exists at all, must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here. "The question," says Tindal, C.J., in *Lang v. Smyth* (1) "is not so much what is the usage in the country whence

(1) 7 Bing. 284, at p. 293.



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the instrument comes, as in the country where it passed." The substance of Mr. Benjamin's argument is, that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach.

Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in *Brandao v. Barnett* (1), "it becomes a part of the law merchant, which Courts of justice are bound to know and recognise."

Bills of exchange are known to be of comparatively modern

(1) 12 Cl. & F. at p. 805.

origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shews that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shews that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure* (1), in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann,

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in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Nêapolitan Pragmatica of 1607. Savary, cited by Mons. Nouguiet, in his work "*Des lettres de change*," had assigned to it a later date, namely 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 13.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of *Shelden v. Hentley* (1), an action was brought on a note under seal by which the defendant promised to pay to *bearer* 100*l.*, and it was objected that the note was void because not made payable to a specific person. But it was said by the Court, "*Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone that brings the note shall be paid.*" Jones, J., said that "*it was the custom of merchants that made that good.*" In *Bromwich v. Lloyd* (2), the plaintiff declared upon the custom of merchants in London, on a note for money payable on demand, and recovered; and Treby, C.J., said that "*bills of exchange were originally between foreigners and merchants trading with the English; afterwards,*

(1) 2 Show. 160.

(2) 2 Lutw. 1582.

when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and, therefore, the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial." To which Powell, J., added, "On indebitatus assumpsit for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received."

In *Williams v. Williams* (1), where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the Court would take notice of it ex officio; and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person secundum usum et consuetudinem mercatorum, drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange had received the sanction of the Courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

(1) Carth. 269.

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It is obvious from the preamble of the statute, which merely recites that "*it had been held* that such notes were not within the custom of Merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The Statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding, in *Miller v. Race* (1), that the property in such a note passes, like that in cash, by delivery, and that a party taking it *bonâ fide*, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held, in *Collins v. Martin* (2), that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

Both these decisions of course proceeded on the ground that the property in the bank-note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made *bonâ fide*.

A similar question arose in *Wookey v. Pole* (3), in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favour of blank or order, contained this clause, "If the blank is not filled up the bill will be paid to bearer." Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiffs' agent, had been deposited by him with the defendants, on a *bonâ fide* advance of money. It was held by three judges of the Queen's Bench, Bayley, J., dissentiente, that an exchequer bill was a negotiable

(1) 1 Burr. 452.

(2) 1 B. &amp; P. 648.

(3) 4 B. &amp; Ald. 1.

security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. "The Courts," he says, "have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities shew, that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (i.e. money), to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it."

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Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer (see *Pott v. Clegg*. (1)) Besides this, a custom has grown up among bankers

(1) 16 M. & W. 321.

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themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.

Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of *Lickbarrow v. Mason* (1), that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the Courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the

(1) 2 T. R. 63.

amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a bona fide holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been aware of the usage prevalent with respect to it in the market in which he purchased it.

Lastly, it is to be observed that the tendency of the Courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen, the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India bonds.

The authorities relied on on the part of the plaintiff do not appear to us materially to conflict with this view. In *Glyn v. Baker* (1), which was an action to recover India Bonds, and in which it was held that such bonds did not pass by delivery, the bonds were not made payable to bearer, and there was a total



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absence of proof that they passed by delivery, though it was asserted by counsel in argument that when these bonds, which in the first instance were made payable to the treasurer of the company, had been indorsed by him, they were afterwards negotiable and passed by delivery from one to another. The inconvenience which would have arisen from this decision was remedied by the immediate passing of 51 Geo. 3, c. 64, by which bonds of the East India Company were made transferable by delivery.

The case of *Partridge v. Governor and Company of the Bank of England* (1), and which, amongst other things, turned on the negotiability of dividend warrants of the Bank of England, is not, so far as that question is concerned, altogether satisfactory, as the decision turned also upon other points. The bank were in the habit of paying dividends to those entitled to them by warrants, and it was pleaded and proved that by a usage of sixty years standing of the bankers and merchants of London, these warrants, which are not made to bearer, were nevertheless negotiable so soon as the party to whom they were made payable had annexed to them the receipt which the bank required before payment would be made. Such a warrant had been obtained by an agent of the plaintiff authorized to receive his dividends, and had been made over to the defendants for good consideration, in fraud of the plaintiff, so far as the agent was concerned, but without knowledge of such fraud on the part of the defendants. The warrant had been delivered by the defendants to the bank, with whom they had an account, to be carried to their credit, and the amount had been entered to their credit in the cash book of the defendants, but had not been carried to their drawing account. The Court of Queen's Bench held this proof of the custom to be a good defence. The Court of Exchequer Chamber reversed their judgment, on the ground, among others, that the custom relied on was "rather a *practice of trade* than a *custom* properly so-called, and that such a practice could not alter the law according to which such an instrument conferred no right of action on an assignee." We quite feel the force of this distinction, though it is not quite so clear in what sense it was here intended to be applied. Possibly what was meant was, that the custom applied to the

(1) 9 Q. B. 396; 15 J. (Q.B. 395.

warrants of a particular company, and therefore could not form the subject of any general mercantile usage.

In *Dixon v. Bovill* (1), where the note was "to deliver so much iron when required to the party lodging this document with me," there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has therefore, with reference to its facts, no bearing on the present.

In *Crouch v. The Crédit Foncier of England* (2), the defendants, a limited company, had issued bonds payable to bearer, "subject to the conditions indorsed on this debenture;" and by the conditions so indorsed the bonds were to be paid off by a certain number being drawn at stated periods; in which respect, it may be observed, they bore a close resemblance to the bonds of foreign governments when loans are thus raised by way of bond. A bond thus made having been stolen from the lawful owner, and having been purchased bonâ fide by the plaintiff from the thief, was drawn for payment. The plaintiff claimed payment, which was refused, whereupon the action was brought. It was there held by three judges of the Court of Queen's Bench that the plaintiff could not recover; first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; but it was assumed, from the report of the learned judge before whom the cause was tried, that this had been tacitly admitted. But it was said that these instruments having been only of recent introduction, it followed that such custom, to whatever extent it had gone, must also have been quite recent. Under these circumstances the Court held that, while it was incompetent to the defendants, as an individual company, to give to that which was not a negotiable instrument at law the character of negotiability by making it payable to bearer, the custom could not have that effect, because, being recent, it formed no part of the ancient law merchant. For the reasons we have already given we cannot concur in thinking the latter

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(1) 3 Macq. 1.

(2) Law Rep. 8 Q. B. 374.

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ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shewn to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to *Gorgier v. Mieville* (1), are to be treated as negotiable. We think the judgment in *Crouch v. The Crédit Foncier* (2) may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called "the ancient law merchant."

In addition to the cases we have already referred to, in which usage has been relied on as making mercantile instruments negotiable, the case of *Lang v. Smyth* (3) was cited as shewing that the question with reference to instruments of this description turns upon how far the particular instrument has by usage acquired the quality of negotiability. The action had reference to Neapolitan bonds with coupons attached to them, which latter referred to a certificate. The plaintiff's agent being in possession of the coupons belonging to the plaintiff, but not of the certificate, fraudulently pledged the coupons with the defendant, who took them bonâ fide. On an action by the plaintiff to recover the amount received by the defendant on the coupons, Tindal, C.J., left it to the jury to say whether the coupons without the certificate "passed from hand to hand like money or bank notes," in other words, "whether they had acquired, from the course of dealing pursued in the City, the character of bank notes, bills of exchange, dividend warrants, exchequer bills, or other instruments which formed part of the currency of this country." The jury, indeed, found in the negative, but it was held by the Court of Common Pleas that the question had been rightly left to them. If the usage had been

(1) 3 B. &amp; C. 45.

(2) Law Rep. 8 Q. B. 374.

(3) 7 Bing. 284.

found the other way, and the Court had been satisfied with the verdict, it would no doubt have been upheld.

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the Courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of *More v. Manning* (1), and *Acheson v. Fountain* (2), that when a bill of exchange was indorsed to A. B., without the words "or order," the bill was nevertheless assignable by A. B., by further indorsement, Lord Mansfield and the Court of King's Bench, in the case of *Edie v. The East India Company* (3), held that evidence of a contrary usage was inadmissible. In like manner in *Grant v. Vaughan* (4), where a cash note, payable to bearer, had been lost by the owner, but had been taken by the plaintiff *bonâ fide* for value, on an action on the note by the latter against the maker, Lord Mansfield having left it to the jury to say "whether such drafts as this, when actually paid away in the course of trade dealing and business, were negotiable or in fact and practice negotiable," and the jury, influenced no doubt by the natural desire to protect the owner of the note, having found for the defendant, Lord Mansfield and the Court here again set the verdict aside, on the ground that, the law having been settled by former decisions that notes payable to bearer passed by delivery to a *bonâ fide* holder, the judge ought to have directed a verdict for the plaintiff.

If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and

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(1) 1 Comyns' Rep. 311.

(2) 1 Str. 557.

(3) 2 Burr. 1216.

(4) 3 Burr. 1516.



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embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery. This being the conclusion at which we have arrived, the judgment of the Court of Exchequer will be affirmed.

*Judgment affirmed.*

Attorney for plaintiff: *Batten.*

Attorney for defendants: *Mackenzie.*

*July 7.*

[IN THE EXCHEQUER CHAMBER.]

SCAIFE v. FARRANT.

*Common Carrier by Land—Contracts to carry Furniture.*

The defendant was the agent of a railway company for collecting and delivering goods and parcels, and also carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons indifferently who applied to him, in his own vans, which he sent by road or rail to all parts of England, the goods and furniture being previously inspected before any contract was made. Generally in such contracts the van or vans were hired by and filled with the goods of one person only. The plaintiff having applied to the defendant to remove his furniture from one town to another, and the defendant's foreman having inspected it, the parties agreed that the defendant should remove the furniture for 22*l.* 10*s.*, the defendant "undertaking risk of breakages (if any) not exceeding 5*l.* on any one article." After the furniture was placed in the defendant's vans, and while in transit, it was burnt without any negligence on the defendant's part. The plaintiff having brought an action for the loss, contended that the defendant was liable as a common carrier:—

*Held* (affirming the judgment of the Court below), that the special contract shewed that the parties intended to limit the defendant's liability to loss by breakage or by the defendant's negligence, and excluded any question of liability as a common carrier; and that the plaintiff could not recover.

APPEAL from the Court of Exchequer.

The defendant was the agent of the South Devon Railway Company, at Torquay, for collecting and delivering goods and parcels for the company about the town and neighbourhood, and also carried on, upon his own account, the business of a

carrier, removing and carrying goods and furniture for hire for all persons indifferently who applied to him. The terms upon which he conducted such business appeared on the following card:—

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“S. D. Railway, Goods and Parcel Office, Torquay. W. Farrant, sole agent. Furniture, &c., carefully stored for any period. Spring vans, carts, and horses on hire. Large lock-up vans for removing glass, china, furniture, &c., by road or rail, without packing. Contracts entered into for removing furniture to or from any part of the kingdom. Estimates given free.”

His offices were at Torquay, and his trade was chiefly conducted by means of vans, which he sent by road or rail to all parts of England. A considerable part of his business consisted in the carriage of furniture and household goods in these vans. The course of business was for the defendant, or his foreman, to inspect the furniture and goods of a customer before any contract with the customer was made, and after such inspection the price was fixed. Generally the van or vans on each particular occasion were hired by and filled with the goods of one person only. In August, 1873, the plaintiff applied to the defendant to remove his furniture and effects from Paignton to Plymouth. The defendant's foreman thereupon was sent by the defendant to inspect the furniture and effects of the plaintiff, and afterwards the plaintiff received the following letter signed by the defendant:—

“Aug. 19, 1873.

“Sir,—I beg to inform you the terms for removal of your furniture and effects (as seen by my foreman) from Paignton to Plymouth will be 22*l.* 10*s.* with risk of breakages in transit, including the use of all necessary mats, cases, and packing materials, and every expense. In the event of your accepting this estimate, be kind enough to sign and return to me the annexed memorandum, by which I am liable to the amount therein specified. Payment of the account is required on delivery of the goods.”

On the other side of this letter was the following memorandum above referred to, which was signed by the plaintiff and returned to the defendant:—

“To Mr. Wm. Farrant,—I hereby agree to pay you the sum of

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22*l.* 10*s.* for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakages (if any) not exceeding 5*l.* on any one article. I am yours, &c.,

“H. M. Scaife.”

The furniture and effects of the plaintiff were afterwards packed in the defendant's van by the defendant's men. The van was taken by them by road from the plaintiff's house at Paignton to the Torquay Station of the South Devon Railway Company, where it was placed by the defendant's men upon a truck to be conveyed by rail to Plymouth. On the journey the van accidentally, and without any negligence on the defendant's part, caught fire, and the plaintiff's furniture and effects were almost entirely consumed.

To recover damages for this loss the plaintiff brought this action against the defendant, declaring against him as a common carrier, and as liable on a special contract to carry safely. The cause was tried before Lord Coleridge, C.J., at the Exeter Summer Assizes, 1874, when the above facts were proved.

It was contended by the counsel for the defendant, that upon these facts the furniture and goods had been carried under a special contract, exempting the defendant from liability as a common carrier; that there was no evidence that the defendant was a common carrier, or that he had incurred the liability of a common carrier, and that he was entitled to a nonsuit.

The learned judge declined to nonsuit, being of opinion that the defendant was not exempted from liability as a common carrier by the terms of the alleged special contract; and that there was evidence that the defendant was a common carrier, and that he had incurred the liability of a common carrier. A verdict was accordingly directed for the plaintiff for the damages claimed in the declaration, subject to reduction upon a reference to an arbitrator, if the arbitrator should think fit to reduce them, leave being reserved to the defendant to move. The defendant having, pursuant to the leave, obtained a rule nisi to enter the verdict for the defendant on the ground that upon the special contract, and other facts proved at the trial, the defendant was not a common carrier, and not liable for the loss of the furniture in question, on the 12th of February, 1875, the Court of Exchequer (Bramwell, Pollock, and

Amphlett, BB.), after argument, made this rule absolute. The ground of their judgment was that the special contract shewed the intention of the parties that the defendant should not be liable except for breakages.

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The question for the opinion of the Court of appeal is, whether the rule ought to have been made absolute or discharged.

June 25. *Lopes, Q.C.*, and *Arthur Charles*, for the appellant, contended that the course of the defendant's ordinary employment was such as to make him a common carrier or liable as such, and they relied on *Liver Alkali Co. v. Johnson* (1) (which they said was undistinguishable from the present case), and referred to *Coggs v. Bernard* (2) and *Clarke v. Gray*. (3) They also contended that the memorandum was not intended to affect the defendant's liability except in the event of breakage, and then only in *amount*, and left him liable as a common carrier in case of fire.

*Cole, Q.C.*, and *Pinder*, for the respondent, cited *White v. Great Western Ry. Co.* (4) and *Brind v. Dale*. (5)

*Lopes, Q.C.*, replied.

*Cur. adv. vult.*

July 7. The following judgments were delivered, those of Lush and Denman, JJ., being read by Mellor, J. :—

LUSH, J. It does not appear to me necessary to decide the question which was first argued in this appeal, namely whether the defendant comes within the definition of, or whether in the ordinary course of his business he incurs the liability of, a common carrier, so as to be answerable for damage to the goods not caused by any act or default of himself or his servants. I agree with the Court below that the letters set out in this case constitute a special contract, and think that, whether without those letters the defendant would have been liable or not for the accident which happened to the goods, the terms of the contract sufficiently show that both parties understood that the risk undertaken by the defendant was of a much more limited nature. Both letters were written by the defendant, the proposal, signed by him, inclosing the answer to

(1) Law Rep. 9 Ex. 338.

(2) 1 Sm. L. C. 188, 7th ed.

(3) 6 East, 564.

(4) 2 C. B. (N.S.) 7; 26 L. J. (C.P.) 158.

(5) 8 C. & P. 207.



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be returned, and which was accordingly returned, signed by the plaintiff. The proposal is, "I beg to inform you that the terms for removal of your furniture and effects (as seen by my foreman) from Paignton to Plymouth will be 22*l.* 10*s.*, with risk of breakages in transit, including the use of all necessary mats, cases, and packing materials, and every expense. In the event of your accepting this estimate, be kind enough to sign and return to me the annexed memorandum by which I am liable to the amount therein specified," &c. The answer is in these terms, "I hereby agree to pay you the sum of 22*l.* 10*s.* for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakages (if any) not exceeding 5*l.* on any one article." Mr. *Lopes* endeavoured to read these letters as merely limiting the amount which should be payable by the defendant in the event of damage by breakage, leaving him by implication liable to the full extent for all other casualties. It is impossible, I think, to put such a construction on the letters, or to suppose that either party so understood them. The fair meaning of them is, that the defendant was willing to undertake a particular casualty and no others, and to pay up to 5*l.* for any article damaged by that casualty; and this the plaintiff must have understood to be the meaning. By that contract both parties are bound. I agree that it does not exclude liability for such damage as might result from want of due and reasonable care in the packing or the carriage of the goods; but the damage which happened was not caused by any such default, but was, as far as the defendant was concerned, purely accidental. I therefore think that the judgment should be affirmed.

MELLOR, J. I am of opinion that this judgment must be affirmed. The facts appear to me clearly to shew that the delivery of the furniture in question to the defendant was not a delivery to him as a common carrier, or as undertaking the liabilities which attach to a common carrier; but was a delivery under the special contract to be collected from the letter of the 19th of August, 1873, set out in the case, and from the memorandum indorsed thereon and signed by the defendant. I think that the meaning of the letter and memorandum is, that the defendant was willing

to remove the furniture from Paignton to Plymouth for the sum of 22*l.* 10*s.*, he undertaking the particular risk of breakage not exceeding 5*l.* on any one article. Of course this does not exclude liability for negligence or want of reasonable care on the part of the defendant and his servants. I think that the circumstances of the case shew that the defendant undertook no other risk of casualty than that, and Mr. Lopes failed to shew that any further or more extensive liability attached to the defendant. He relied mainly upon judgment in *Liver Alkali Co. v. Johnson* in the Exchequer Chamber. (1) Had that case not been clearly distinguishable in its facts from the present, it would have been binding upon us, sitting as a co-ordinate Court of Appeal, and it can only be qualified or reversed by a decision of the House of Lords. For myself I decline on the present occasion to discuss the grounds upon which that case proceeded, because I think it is entirely unnecessary to do so; and I therefore confine my decision to the meaning of the special contract between the parties to which I have already referred.

My Brother Grove agrees with this judgment, and my Brother Lindley agrees with both this and the judgment of my Brother Lush.

DENMAN, J. I am of opinion that the judgment of the Court of Exchequer in this case ought to be affirmed. It was contended for the defendant, first, that the general course of his dealing did not make him a common carrier, or one who was subject to the liability of a common carrier, quâ furniture undertaken to be carried; and, secondly, that even if he might, in the absence of any special contract, have been liable as a common carrier, there was in this case such a special contract for the carriage of the furniture of the plaintiff as to exempt the defendant from the liability which, in the absence of a special contract, might possibly have been inferred. Upon the first point the plaintiff relied mainly upon the case of *Liver Alkali Co. v. Johnson* (1), affirmed in this Court. (1) If that case were identical in its material facts with the present I should hold myself bound by it so far as to say that, whether a common carrier or not, to all intents and purposes

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(1) Law Rep. 7 Ex. 267; in Ex. Ch. Law Rep. 9 Ex. 338.

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the defendant must be held liable, as having undertaken a business imposing upon him the same liabilities as those of a common carrier. But I am of opinion that the mode of dealing adopted by the defendant in this case differs in many most important particulars from that of the defendant in *Liver Alkali Co. v. Johnson*. (1) In this case, though it is found "that the defendant has for several years carried on upon his own account the business or employment of a carrier, removing and carrying goods and furniture for hire for all persons indifferently who applied to him," the case adds that he conducts that business upon terms which appear upon the card annexed to the case. Upon a perusal of this card it appears to me that it contains terms which, added to the other facts found in the case in relation to the defendant's ordinary mode of doing business, negative any inference in favour of his being a common carrier, which might otherwise have arisen from the above-mentioned finding, and also negative any inference that he dealt upon such terms as to incur the liabilities of a common carrier. The card is headed "S. D. Railway Goods and Parcels Office." It describes the defendant as "sole agent," which I interpret to mean "of the S. D. Railway Company." It speaks of "furniture stored," of "vans, carts, and horses on hire," neither of which can be said to refer to the proper business of a common carrier. It then contains these words: "Large lock-up vans for removing furniture, glass, and china, &c., &c., by road or rail without packing," which is quite as consistent with the business of letting out such vans on hire as with an undertaking to use such vans as a carrier in removing the goods of others. Then at the foot of the card are the words, "Contracts entered into for removing furniture to or from any part of the kingdom; estimates given free." On the back of the card is engraved a specimen of one of the vans riding on a railway truck. The case finds that the course of business is for an inspection of the furniture to take place before any contract is made, and for the price to be fixed after such inspection. Reading the whole of the card together with the facts found, I come to the conclusion that the defendant did not so deal with the public as to undertake to carry goods in the absence of an agreement as to terms of carriage. The card

(1) Law Rep. 9 Ex. 338.

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itself must, I think, be taken as a part of the defendant's mode of dealing, and the substance of it appears to me to be, not that he will carry at all events, but only that he will carry if his estimate and terms, whether as to liability or otherwise, are agreed to. In discussing these terms many things would have to be taken into account, as, for example, whether the goods were to go by road or rail, whether the van was to be under the control of the plaintiff's or the defendant's driver, whether any other person's goods are to be allowed to travel in the same van or not (for the case does not find that one van is always used for the goods of one person); and many other matters, such as route, speed, whether in van or cart, &c., the decision as to which might alter the estimate.

In *Liver Alkali Co. v. Johnson* (1) Kelly, C.B., says: "No doubt if each particular voyage had been made under a special contract containing stipulations applicable to that voyage only, the case would have been different." In the present case I think that the very mode of dealing pointed out in the card and stated in the case necessarily involves a special contract in each case applicable to each journey only, and that the case of *Liver Alkali Co. v. Johnson* (1) is very distinguishable on that ground. I think the card itself was fair notice to the world that a special contract must be made before any liability to carry would be incurred, and that it follows that any one having such notice would be bound to stipulate expressly for any such liability as that of a common carrier before he could charge the defendant as upon any such liability.

Upon the second point, viz., whether, supposing the defendant to be generally carrying on the business of a common carrier, or carrying on business so as to be generally liable as a common carrier, he was so liable in this case; or whether he had not limited his liability by reason of the letters of the 19th of August, 1873, set out in the case; I entirely agree with the view taken by Bramwell, B., in the court below. The words "you undertaking risk of breakages," though to an amount immediately afterwards limited, seem to me conclusive to shew that the relation of common

(1) Law Rep. 7 Ex. at p. 269.



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carrier to owner of goods was not contemplated by the plaintiff in the particular case, whatever might have been their relation in the absence of such a stipulation. On both grounds I am of opinion that our judgment should be for the respondent.

COCKBURN, C.J. I entirely agree in the view taken by the rest of the Court that this was a special contract, and that the question of the liability of the defendant as a common carrier could not arise. Had it not been so I should have thought myself bound to enter into the question whether the defendant was a common carrier at all, and after a careful examination of *Liver Alkali Co. v. Johnson* (1) and all the authorities, I think that question ought to be submitted to further consideration.

BRETT, J. I desire to say that I agree with the rest of the Court as to this being a special contract, but I also agree with what I understand to be the view of the Lord Chief Justice, that whatever might be the true effect of the judgment in *Liver Alkali Co. v. Johnson* (1), in this case there is no evidence at all that this person was a common carrier.

*Judgment affirmed.*

Attorneys for plaintiff: *Wedlake & Letts, for J. & R. G. Edmonds, Plymouth.*

Attorney for defendant: *G. Davis.*

(1) Law Rep. 9 Ex. 338.

RICHARDSON AND ANOTHER *v.* WRIGHT.

W. H. WRIGHT, CLAIMANT.

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*County Court Act, 1867 (30 & 31 Vict. c. 142), rr. 174–180—Interpleader—Particular of Goods claimed—Insufficient description.*

By rule 174 of the County Court Act, 1867, the claimant in an interpleader is required, five clear days before the day appointed for hearing the summons, to deliver to the bailiff or leave at the office of the registrar a particular of the goods alleged to be his property, and also the grounds of his claim.

Goods and money which had been seized under an execution upon a county court judgment were claimed by W., who delivered to the registrar a particular describing them as “the goods and money seized by virtue of the warrant.” In the grounds of claim it was stated that the goods were the property of the claimant, and were at the time of the seizure in his possession. This particular was held insufficient by the judge, who refused to go further into the case, and made an order in favour of the execution creditors with costs.

Upon a rule calling upon the execution creditors and judge to shew cause why the judge should not hear and adjudicate upon the claim:—

*Held*, by Kelly, C.B., and Amphlett, B., that the particular was sufficient; by Bramwell and Cleasby, BB., that it was insufficient.

RULE calling upon the plaintiffs and the judge of the County Court of Kent to shew cause why the judge should not hear and adjudicate upon a claim made to certain goods taken in execution under a judgment of the county court. The facts and arguments appear in the judgments.

June 10. *Francis* shewed cause, and cited *Reg. v. Stapylton*. (1)

*E. Thomas*, in support of the rule, cited *Reg. v. Richards* (2); *Churchward v. Coleman* (3); *Heslop v. M'George* (4); *Whitehead v. Procter*. (5)

*Cur. adv. vult.*

July 7. The following judgments were delivered.

CLEASBY, B. This was a rule granted under 19 & 20 Vict. c. 108, s. 43, calling upon the plaintiffs in the cause and the judge of the County Court of Kent, holden at Margate, to shew cause why the judge should not hear and adjudicate upon a claim made to certain goods taken in execution.

(1) E. L. M. & P. 603; 21 L. J. (Q.B.) 8.

(3) Law Rep. 2 Q. B. 18.

(2) L. M. & P. 263; 20 L. J. (Q.B.) 351.

(4) 18 L. T. 109.

(5) 3 H. & N. 532.

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The application was made on behalf of William Horace Wright, the claimant in an interpleader. Certain goods and money had been seized under an execution issued upon a judgment of the county court, and these were claimed in the usual way by a notice that the goods and money seized were the property of the claimant.

The practice of the county courts in interpleader cases is regulated by certain rules and forms which, when duly made, are in force by virtue of the Act 19 & 20 Vict. c. 108, s. 32.

The rules now in force are rules Nos. 174 to 180 of the rules issued in 1867. By rule 174 the claimant is bound, five clear days before the day appointed for the hearing the interpleader summons, to leave with the registrar a particular of the goods alleged to be his property, and also the grounds of his claim.

The importance of this rule, which is in the same terms as the rule in force previously, is obvious. It is to make it certain with respect to what goods the decision of the judge is to operate, or there might be many disputes afterwards; and also to let the execution creditor know what particular goods are claimed, and also what are the grounds of the claim, so that he may be prepared at the hearing to meet the case in whole or in part.

In the present case it appears that the summons was originally returnable on the 22nd of October. On that day no particular whatever had been left in compliance with rule 174, and the claimant could not be heard. It is probable he thought he might rely upon the original notice that he claimed the goods. The judge, however, adjourned the case to the next court day, the 12th of November. On that day a notice had been left which the judge thought insufficient, and he adjourned the case to the next court day, the 10th of December, to allow an amended notice to be delivered.

On the 10th of December, when the summons was called on, no further notice had been delivered, and the judge further adjourned the case to the 14th of January, making a peremptory order that if proper notice was not delivered the summons would be struck out.

On the 26th of December a notice was left in a form annexed to the affidavit, and on the 14th of January, the court day, the attorney for the claimant did not appear, and the judge made an

order in favour of the execution creditors with costs, but he ordered the money not to be paid out until after the next court day, reserving liberty to the claimant to apply.

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On the next court day, the 11th of February, the attorney for the claimant appeared, and on his application to have the case reheard, the judge granted his application on the terms of his paying 10*l.* into court as security for costs.

The hearing was then adjourned by consent to the 15th of April.

On the 10th of April a particular of the goods claimed, and of the grounds of claim, was delivered.

This particular was the subject of the judge's decision, and is annexed to the affidavit of Mr. Dorman, the attorney for the plaintiffs. By it the attorney for the claimant claims "the goods and money seized by virtue of the warrant," and the ground alleged is that they were the property of the claimant, having been purchased by him from one Moore on the 1st of July, and at the time of the seizure being in possession of the claimant, and never having been the property of the defendant.

The statement of facts is taken from the affidavit of the attorney for the plaintiffs. There is no dispute as to the form of the particular actually given, and the facts are stated to account for the delay from the 22nd of October to the 10th of April.

Under these circumstances, upon the objection of the execution creditors to the sufficiency of the particular, the judge held it insufficient, and refused to go into the case further, making an order in favour of the execution creditors, with costs.

It appears to me that the judge was justified in the conclusion which he arrived at, and that we ought not to order him to hear the case any further. The objection was to the particular of the goods claimed, and not to the grounds of claim. I think that the only particular of the goods claimed being that they were seized, it was quite competent for the judge to decide that this particular, under the circumstances of the case before him, was insufficient both for his own adjudication and for the information of the execution creditors. If the execution creditor lives at a distance it gives him no particular at all, but only lets him know how he may get one, namely, by going to the sheriff.



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The statement at the end of the grounds of claim that the goods and money were in the possession of the claimant gave no real information, and possibly the doubtful question which he would have to determine would be in whose possession they were.

The money claimed was 3*l.*, taken out of the till of an hotel, of which the defendant in the action was the licensed proprietor, and therefore the question would arise in whose possession the concern really was.

It was represented on the part of the claimant that the judge had required as accompanying the notice some schedule or inventory of the goods claimed. If the particular had been that the claim was of all the household furniture and trade utensils, &c., in the hotel at the time of seizure, I should have thought it unreasonable in the judge to require that these should be all scheduled in detail, but the subject of the decision was the actual notice which there had been so many adjournments to rectify, and as to this I think he was well warranted in his conclusion.

We were referred to several authorities in which the Court of Queen's Bench had directed the county court judge to proceed and hear such cases where they thought the judge had erroneously decided as to the sufficiency of the particulars: *Reg. v. Richards* (1); *Churchward v. Coleman*. (2) In the first of these cases the goods were described in detail, and the objection was to the sufficiency of the grounds of claim.

In the second case the only objection was to the ground of claim, the particulars of the goods claimed being sufficient, viz. the goods, chattels, and effects in and about the house of the defendant situated at North Camp.

The Court of Queen's Bench in both cases thought there was a sufficient statement of the ground of claim as well as of the goods claimed, and ordered the judge to hear the case.

If a similar description had been given in the present case to that given in the case last referred to, I should have thought it, under the circumstances, sufficient though general, but I think, the only description being that they were the goods seized in execution, this might well be considered insufficient.

I therefore think there is no sufficient ground for directing the

(1) L. M. & P. 265; 20 L. J. (Q.B.) 351.

(2) Law Rep. 2 Q. B. 18.

judge to hear this case further, and that the rule ought to be discharged.

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I must say, for myself, that when a county court judge has really heard and disposed of the question of sufficiency of particulars, which is, I conceive, a matter properly before him for decision, though in some sense of a preliminary character, I should not feel myself justified in hearing that question discussed upon affidavits with a view to overruling his decision. The practice and procedure of the county courts are regulated in this and other matters by certain rules and forms which have the sanction of an Act of Parliament. It is the duty of the county court judges to administer justice in conformity with those rules and forms, but it is really most inconvenient, not to say more, for the superior courts, except where jurisdiction is given them, to entertain the question how far those rules and forms have been complied with.

I should not depart from authorities when they were in point, but only yield to them. If the case was sent to the judge again the same question would be raised, and how could he decide it except upon his judgment, having jurisdiction without the advantage of correction on appeal.

I think the rule must be discharged.

BRAMWELL, B. I am of the same opinion.

AMPHLETT, B. Two points were argued before us against the rule. First, it was said that this Court had no jurisdiction to interfere with the decision of the county court judge upon the sufficiency of the particular of claim. The contrary has, however, been settled by authorities which were cited on the argument, and which in my judgment we are bound to follow: *Reg. v. Richards* (1); *Churchward v. Coleman* (2); *Whitehead v. Procter*. (3)

But, secondly, it was said that the county court judge was right in holding the particular of claim insufficient. I am not, however, of that opinion. The object of requiring particulars appears to be that the execution creditor may know what case he has to meet, and when he is told that the claim extends to the whole of

(1) L. M. & P. 263; 20 L. J. (Q.B.) 351.

(2) Law Rep. 2 Q. B. 18.

(3) 3 H. & N. 352.

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the goods seized by the sheriff, what useful purpose can be answered by compelling the claimant to go to the expense and trouble of furnishing an inventory or further description? It may well be when the goods seized are the furniture, for instance, of a large hotel, that the expense of an inventory would be much more than the execution creditor's debt.

In *Churchward v. Coleman* (1), above referred to, a notice claiming the goods in and about the house and premises of the defendant seized under the execution, was held sufficient without further describing the goods. But then it was argued that in the present case the particular is insufficient because it does not specify the hotel in which the goods were. But who could have been misled by the omission? There was no question about any other goods but those in the hotel.

The sheriff came to the county court for protection, and would naturally state, and was, in my opinion, the proper person to state, what it was he had seized, and in respect of which he claimed protection, and the whole litigation would proceed upon the footing of that statement.

Moreover, it is quite clear from the course of the argument before us and the proceedings before the county court judge that the simple omission of the place where the goods were seized was not the ground of the judge's decision; if it had been, he would no doubt in furtherance of justice have suggested the necessary amendment, which might have been done by a few strokes of the pen.

Being of opinion, therefore, that the particular of claim gave the execution creditor all the information that would have been of the slightest use to him, I think that the requirements of the 174th rule were substantially complied with, and that the county court judge ought to have adjudicated on the claim on its merits.

KELLY, C.B. The first question is whether we are entitled to overrule the decision of the county court judge as to the sufficiency of these particulars, and I need only say that we have been referred to two cases in which the Court of Queen's Bench has exercised such a right.

(1) Law Rep. 2 Q. B. 18.

The question as to the sufficiency of the particulars themselves is not of much importance, as each case must be decided on its particular circumstances; but I own that but for the opinion entertained by my Brothers Bramwell and Cleasby, I should have thought the case too clear for argument. It appears that an execution had been put into an hotel. We are not informed—the affidavits, to say the least, are obscure, if not entirely silent, as to what took place on the occasion of the seizure. Whether anything more took place than the bailiff going in and saying that he came to levy, and then immediately and without more leaving the place, is at least questionable.

Under these circumstances, the question arises whether the particulars are sufficient. I own, after minute attention, that I am at a loss to imagine how it was humanly possible for the claimant to give any other or better particulars than he gave. I have no means of knowing what articles were seized, but the county court judge seems to have required that the claimant should give something like an inventory of the goods which he claimed. Now, inasmuch as no one seems to have been in a position to say what articles were seized, what particulars could the claimant give except these, “Whatever goods you have seized, those I claim?” The rule requires that the claimant shall give a particular of the goods which he claims, but this law must receive a reasonable construction, and what can be suggested that he should say, except, “I don’t know what goods you have seized, but whatever they are I claim them?” It has been contended that he might have said, “All the goods in the hotel.” But why? It might turn out that some of the goods in the hotel did not belong to him, though the goods which were seized were his property. However, as my Brothers Bramwell and Cleasby are of a different opinion, the rule will drop.

*Rule dropped.*

Attorneys for the execution creditors: *Kingsford & Dorman, for Sankey & Co., Margate.*

Attorney for claimant: *J. C. Allen.*

END OF TRINITY TERM, 1875.

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